



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

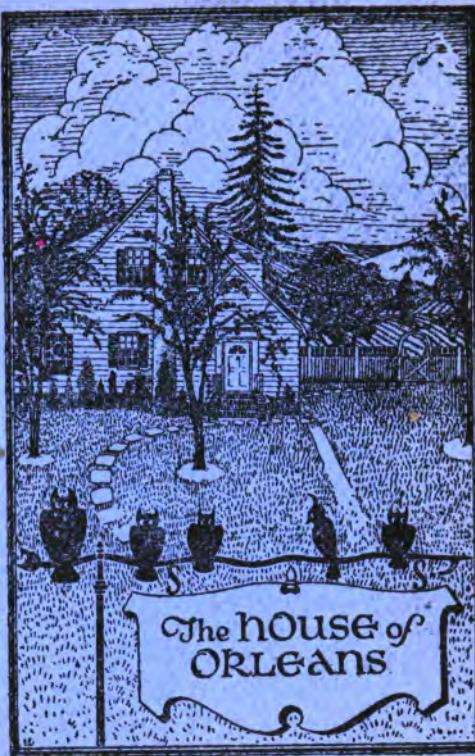
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



CR, ye + Law

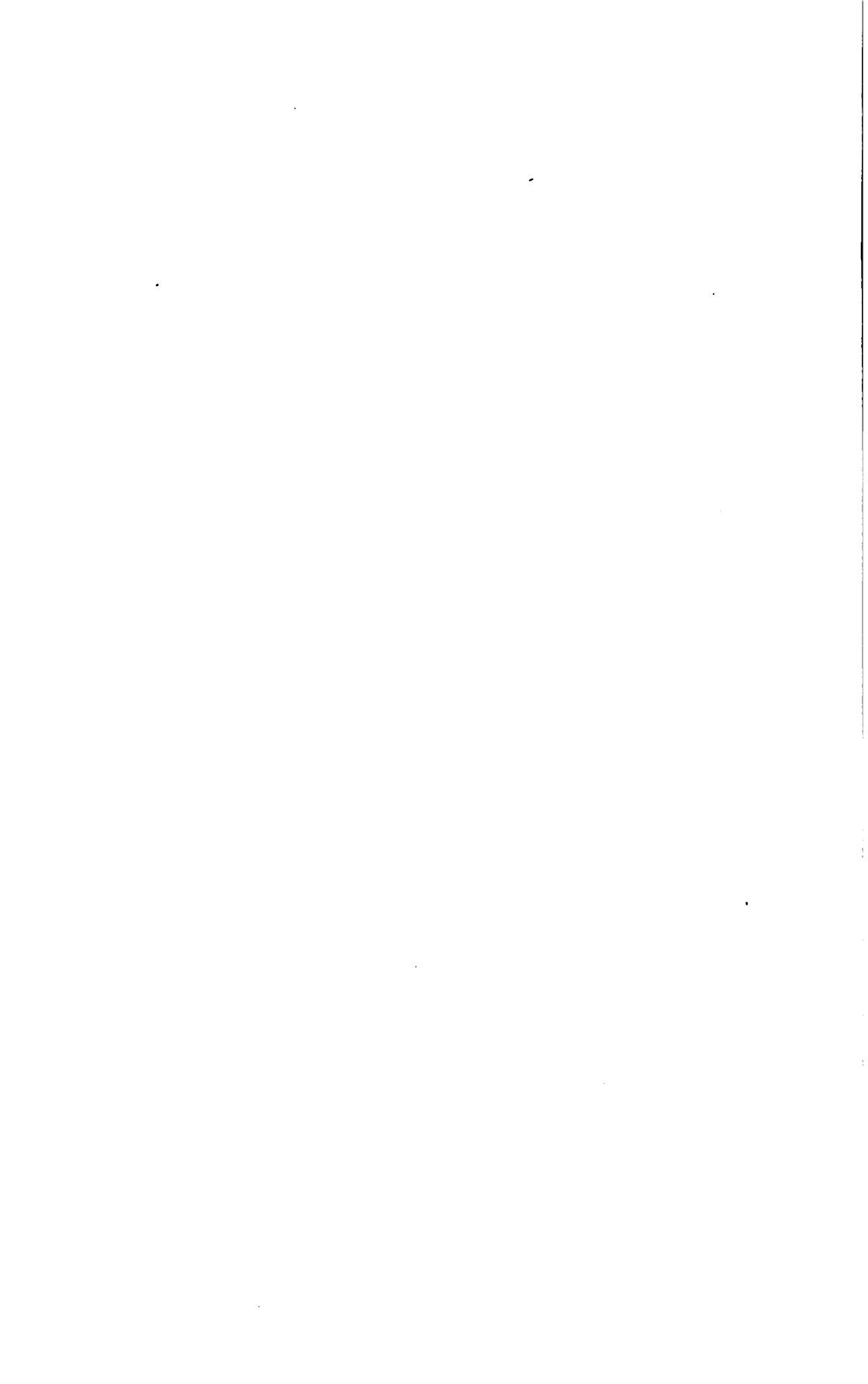
AP
ABH
G.A. n

STANFORD LAW
LIBRARY



IN
MEMORY OF
HENRY VROOMAN

A NOTABLE LIBEL CASE



A
NOTABLE LIBEL CASE

The Criminal Prosecution of
THEODORE LYMAN JR. by **DANIEL WEBSTER**
in the
Supreme Judicial Court of Massachusetts
November Term 1828

—
JOSIAH H. BENTON JR.
—



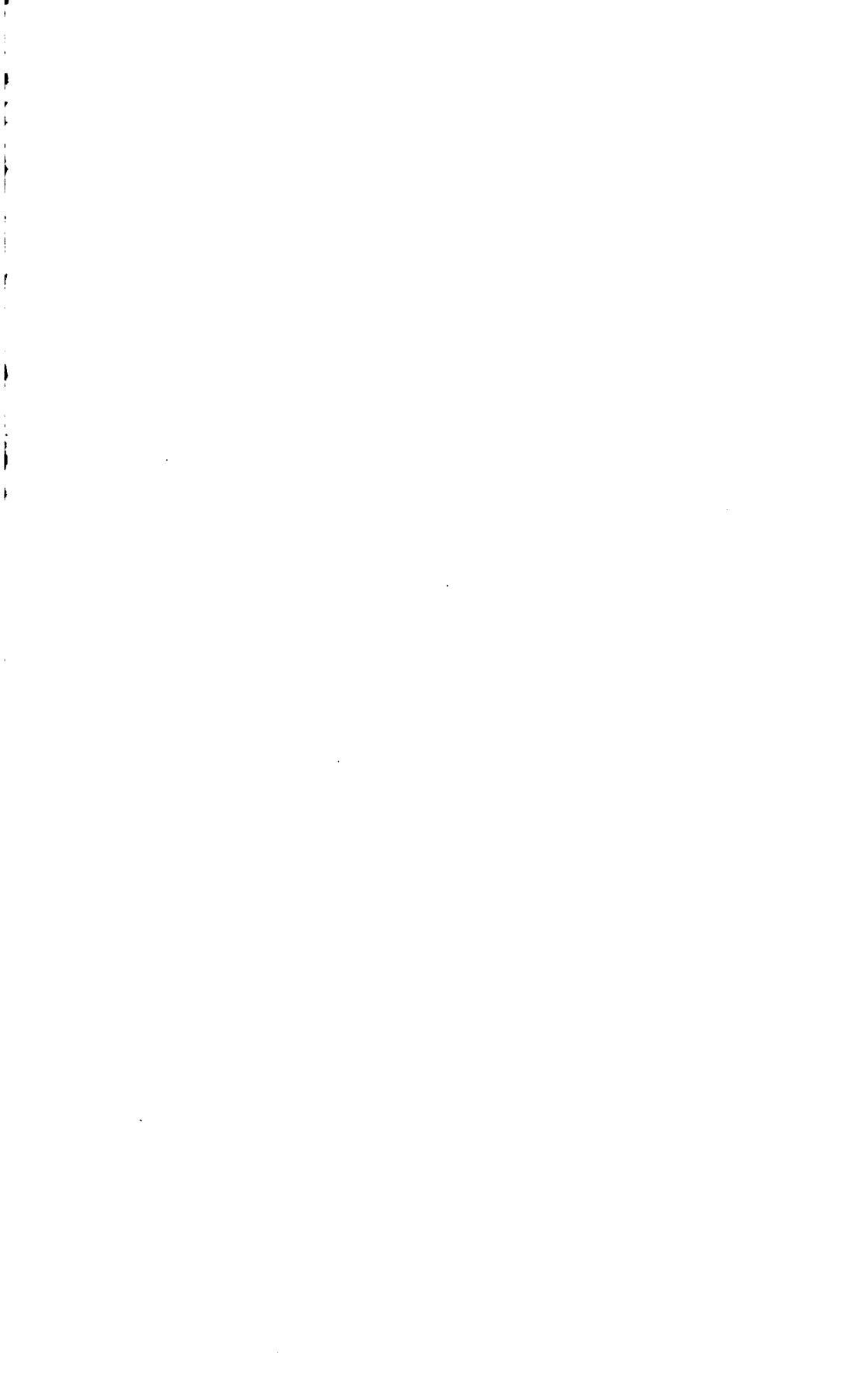
BOSTON
Charles E. Goodspeed
1904

Copyright, 1904, by **JOSIAH H. BENTON, JR.**

D. B. UPDIKE, The Merrymount Press, Boston

LIST OF ILLUSTRATIONS

	FACING PAGE
DANIEL WEBSTER <i>From a Painting in the SUPREME JUDICIAL COURT, Boston</i>	2
THEODORE LYMAN, JR. <i>From a Bust in the possession of Mrs. G. Howland Shaw, Boston</i>	6
DANIEL DAVIS <i>From a Painting in the possession of Captain CHARLES HENRY DAVIS, U. S. N.</i>	52
SAMUEL HUBBARD <i>From a Painting in the possession of WALTER BUCK, Andover, Massachusetts</i>	80
ISAAC PARKER <i>From a Painting in the SUPREME JUDICIAL COURT, Boston</i>	96



A NOTABLE LIBEL CASE

“**D**ID you, Mr. Webster, at that, or any other period, ever enter into any plot to dissolve the Union?”

Strange as it may now seem, the Solicitor-General of Massachusetts deemed it necessary to put this question to Daniel Webster, as a witness for the Government upon the trial of a criminal prosecution in the Supreme Judicial Court. Mr. Webster answered, “I did not, sir.”

The trial was of an indictment of Theodore Lyman, Jr., for alleged criminal libel upon Daniel Webster, as a Senator of the United States, in 1828. The indictment alleged that Lyman had charged Webster with having conspired with other leading Federalists in 1807–1808 to break up the Union and re-annex New England to England.

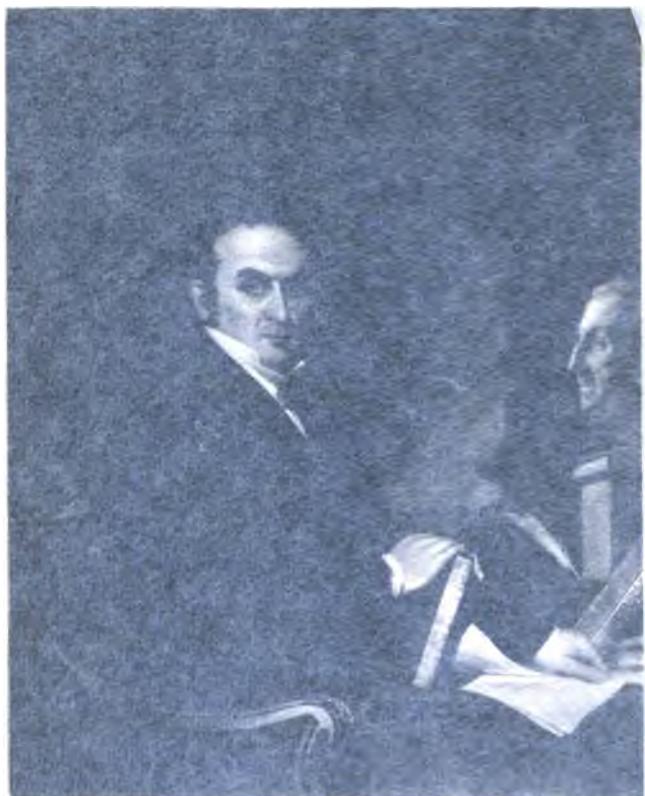
This was a notable case, not only on account of the high standing of Mr. Lyman, the respondent, and of Mr. Webster, the prosecutor, but also on account of the legal and political questions raised and discussed. The trial embraced in its scope the political history of the country during the tumultuous period

from 1806 to 1816, the Embargo Acts, and the resistance to them, the conduct of the Hartford Convention, the construction of the Federal Constitution, the power of the United States "to raise and support armies," and the right of the States to secede from the Union. Chief Justice Parker,* who presided, had, as a member of the Supreme Judicial Court, in 1812, solemnly advised the Governor and Council that the President of the United States could constitutionally call out State militia for national defence and war only at the will of the Governor of the State.† The leading counsel for the defence (afterwards a Justice of the Supreme Judicial Court) maintained that the States had a constitutional right to secede, and in argument stated this doctrine in the plainest terms, without correction by the Court, or dissent from Mr. Webster or the Solicitor-General.

The trial excited not only local, but national, inter-

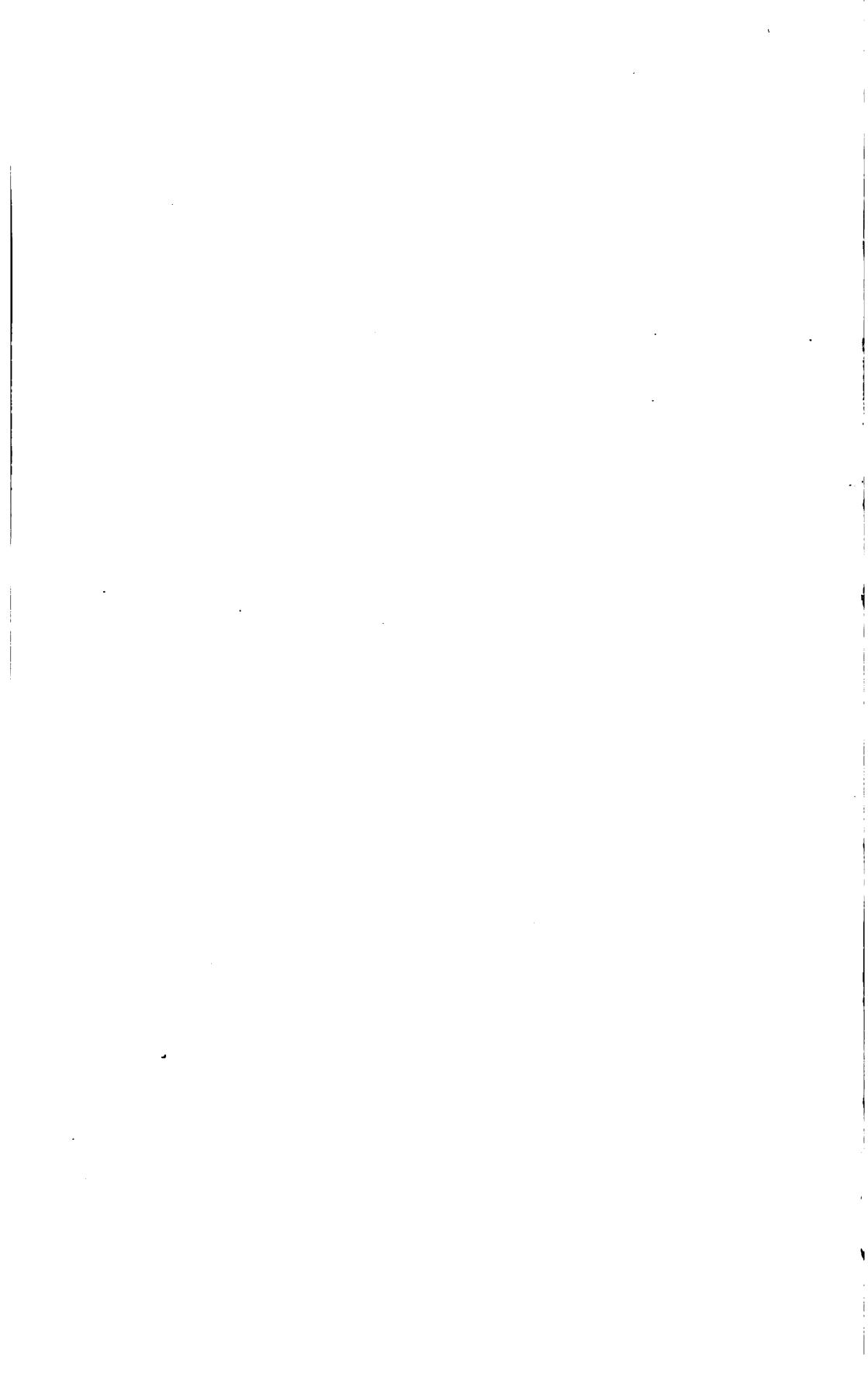
* Isaac Parker was born in Boston, June 17, 1768, was graduated from Harvard in 1786, was a member of the House, 1791-1795, State Senator in 1796, member of Congress from the District of Maine, 1797-1799, voted and spoke for the Alien and Sedition Acts and failed of a reëlection. In 1799 President Adams appointed him United States Marshal for the District of Maine, which office he held until 1809, when he was removed by President Jefferson. He was Associate Justice of the Supreme Judicial Court, 1806-1814, and Chief Justice, 1814-1830. He was the first Royall professor in Harvard Law School, filling the place from 1816 to 1827. He was a trustee of Bowdoin College for eleven years, and an overseer of Harvard for twenty-two years. He was President of the Constitutional Convention of 1820, and died in the office of Chief Justice at Boston, May 26, 1830.

† Massachusetts Acts and Resolves, 1812, p. 78. "Speech of Governor Strong. Opinions of Justices of Supreme Judicial Court, and other documents. Published by order of the General Court 1812."



DANIEL WEBSTER

From a Painting in the Supreme Judicial Court, Boston



est at the time, and yet the name of the person prosecuted and the real facts of the trial have been so far suppressed in general history that but few of even the best informed persons are now acquainted with them. Edward Everett and Henry Cabot Lodge do not mention the trial in their biographies of Webster. Neither Lanman, Harvey, nor any other biographer of Webster, except Curtis, says anything of it, and it is not mentioned in any published or unpublished Webster papers or correspondence, so far as I can ascertain. It is mentioned in the famous diary of John Quincy Adams, where he wrote: "January 16, 1829, Mr. Clay said he had mentioned "to Mr. Webster Lyman's libel and my publication "of 21st October, and that Mr. Webster professed "to have no unfriendly feeling to me, but that he "seemed to regret his having prosecuted Lyman."

And again on March 21, 1829, after Mr. Adams had ceased to be President, he wrote in his diary: "Mr. Webster called also to take his leave. I told "him that in the publication in the National Intelligencer of 21st October last I had not the most distant reference to him, and he said that he had no "feeling of dissatisfaction from it regarding me."

But Mr. Adams says Webster spoke with great bitterness of Harrison Gray Otis* and other Federal-

* Harrison Gray Otis was born in Boston, October 8, 1765, was graduated

ists, and regretted the publication of Mr. Adams, because he thought it would tend to cause the Hartford Conventionists and the Jackson people to unite.

Even Mr. Curtis, in his extended biography of Webster, while he speaks of the case, carefully suppresses the name of the person indicted, referring to him only as "a gentleman of high social standing." He says: "In the Autumn of 1828, Mr. Webster prosecuted a gentleman of high social standing in Boston by indictment for a libel." He then gives two pages to a statement of the case from the Webster side, and concludes by saying that, while the jury did not agree, ten were for conviction, and adds in a note that "a clearer case of libel could not well exist." Mr. Curtis even suppresses Mr. Lyman's name in printing a letter from Henry Clay to Webster, of November 30, 1828, in which Clay says: "You have all my wishes for success in the prosecution against Lyman." Curtis quotes it "in the prosecution against —."* This suppression of Mr. Lyman's name,

from Harvard, 1788, appointed United States District Attorney, 1796, was a member of the House, 1796, member of Congress, 1797-1799 and 1799-1801, member of the House, 1802, -3, -4 and 1813, and was Speaker in 1803 and 1804. He was State Senator in 1805, -6, -7, -8, -9, -10, -11, -12, -14, -15 and 1816, and was President of the Senate in 1805, 1808, 1809 and 1810. He was Presidential Elector in 1812, and United States Senator, 1817-1822. He was a member of the Hartford Convention in 1814, and one of the three Commissioners sent by Massachusetts, January 31, 1815, to negotiate with the National Government as to the conduct of the war. He was Mayor of Boston in 1829, 1830 and 1831, and died in Boston, October 28, 1848.

* Curtis's Life of Webster, vol. i, pp. 331, 336.

while perhaps intended to avoid injury to the feelings of his family and friends, recently provoked inquiry from a prominent gentleman in a Southern State as to the name of the "gentleman of high social standing" prosecuted by Webster. This inquiry led me to investigate the trial, its causes and circumstances, and also to examine other matters connected with it.

An examination of the Court records shows that the person prosecuted was Theodore Lyman, Jr. A pamphlet, now rare, by John W. Whitman, reporting the trial, and the Boston Daily Advertiser of December 22, 1828, give what are apparently fairly accurate accounts.

The prosecution was really only an echo of the Napoleonic wars. If there had been no struggle of Napoleon against England and the other European powers, there would have been no Berlin and Milan Decrees by Napoleon, no Orders in Council by George III, and no Embargo Acts under Thomas Jefferson; there would have been no combination in New England against the Embargo Acts, and Daniel Webster would not have been charged with combining with other leading Federalists to break up the Union on account of the Embargo Acts. Lyman was said by Webster to have made this charge against him, and it was for this that Webster caused Lyman to be indicted and tried.

The circumstances of the publication of the alleged libel and of the prosecution were these:

In 1828, John Quincy Adams was the Federalist, and Andrew Jackson the Democratic (or, as it was then called, Republican) candidate for President. Adams, who was chosen to the United States Senate, in 1808, as a Federalist, had voted for the Embargo Acts of 1807 and 1808, and thereby provoked the bitter hostility of the Massachusetts Federalists. In 1828, Webster and most Federalists in Massachusetts supported Adams for the Presidency as against Jackson, but other Federalists, who had not forgiven Adams for his support of the Embargo Acts, supported Jackson, and established a semi-weekly paper in Boston called the "Jackson Republican," for the purpose of opposing Adams and supporting Jackson.* Theodore Lyman was one of the proprietors of this paper. October 29, 1828, there was published in the Jackson Republican the following article:

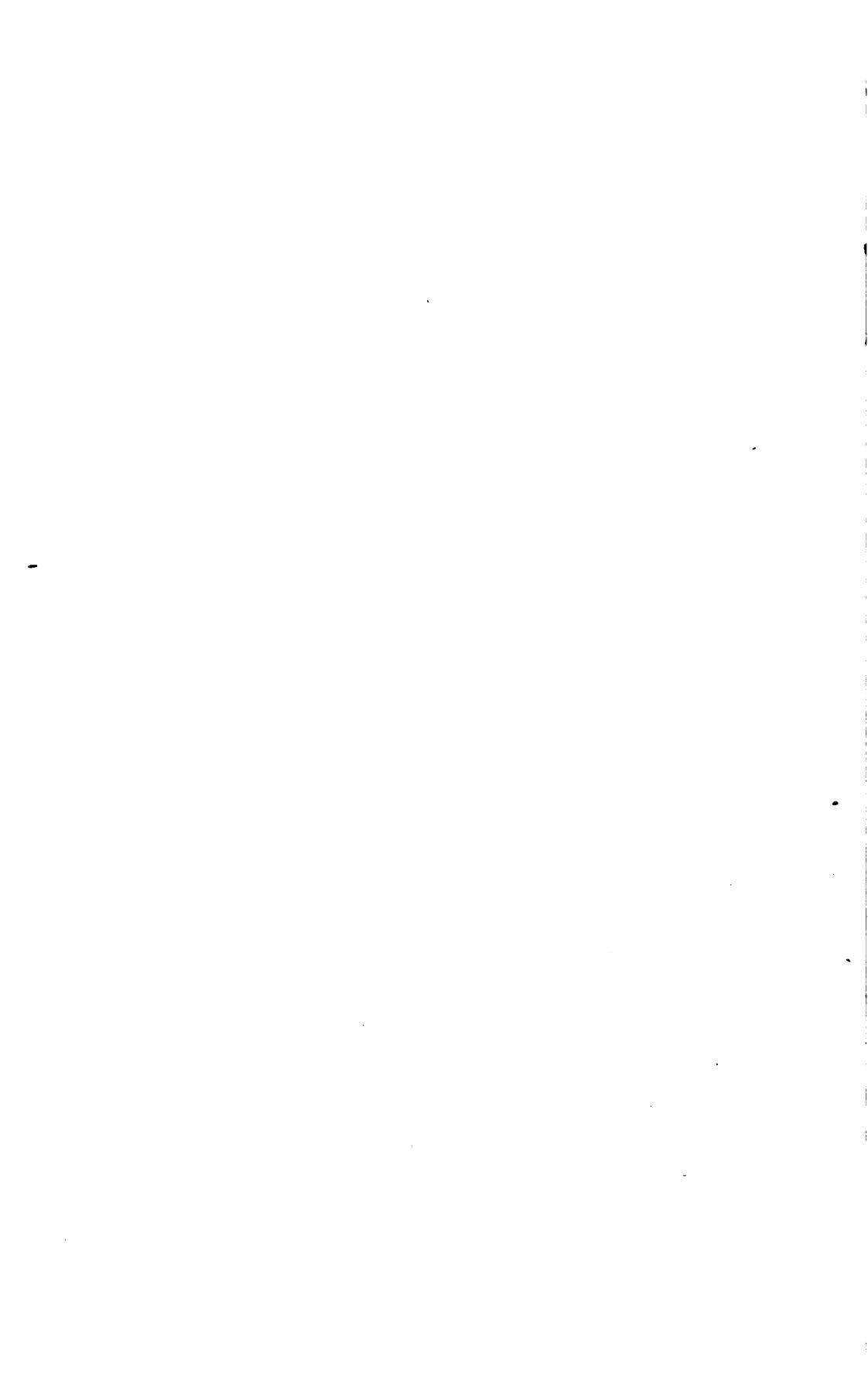
"WE publish this morning a letter of December, 1825, of Mr. Jefferson to Mr. Giles, and Mr. Adams's own statement, published last week in the National

*January 21, 1829, after the election of Jackson, this paper was called "The Evening Bulletin and United States Republican." April 29, 1830, the paper was transferred to the New England Palladium, which had been established as the Massachusetts Mercury in 1793, and was in 1830 merged in the Columbian Centinel. In 1840 the Centinel was merged in the Boston Advertiser, which was established under that name March 3, 1813, and was the successor of several Boston papers bearing the Advertiser name, commencing with the Independent Advertiser, established January 4, 1748.



THEODORE LYMAN, JR.

From a Bust in the possession of Mrs. G. Howland Shaw, Boston



"Intelligencer at Washington, concerning disclosures
 "said, many months ago, to have been made by Mr.
 "Adams to Mr. Jefferson, in regard to the conduct of
 "the leaders of the Federal party in New-England,
 "during the whole course of the commercial restrictive
 "system. Mr. Adams confirms in his statement, in a
 "positive and authentic form and shape, the very im-
 "portant fact, that in the years 1807 and 1808, *he did*
 "make such disclosures. The reader will observe, that
 "Mr. Adams distinctly asserts, that Harrison Gray
 "Otis, Samuel Dexter,* William Prescott, Daniel
 "Webster, Elijah H. Mills, Israel Thorndike, Josiah
 "Quincy, Benjamin Russell, John Welles, and others
 "of the Federal party of their age and standing were
 "engaged in a plot to dissolve the Union and to re-
 "annex New England to Great Britain; and that *he*
 "(Mr. Adams) possessed 'unequivocal evidence' of
 "that most solemn design. The reader will also observe,
 "that in the statement, just published, of Mr. Adams,
 "there is no intimation whatever, that he *does not still*

* Samuel Dexter was born in Boston, May 14, 1761, was graduated from Harvard, 1781, was State Senator, 1792, member of Congress, 1793-1795, United States Senator, 1799 to June, 1800, when he resigned and became Secretary of War, which office he held until December, 1800, when he became Secretary of the Treasury, holding that office until March, 1801. He was a member of the Governor's Council in 1804 and 1805. He was one of the most eminent lawyers and advocates of his time. Mr. Webster said of him after his death: "The earnestness of his convictions wrought conviction in others. One was convinced and believed and assented because it was gratifying and delightful to think and believe in unison with an intellect of such evident superiority." He died in Athens, New York, May 4, 1816.

"believe what he revealed to Mr. Jefferson and Mr. Giles twenty years ago. All the gentlemen we have mentioned above, are, with one exception,* still living, and, with two exceptions, are *active* and *ardent* political friends of Mr. Adams. We here beg leave to ask, why Mr. Adams's statement has been withheld from the public eye more than a year? Why it has been published only one fortnight before the election for President all over the country? Why for three years he has held to his bosom, as a political counsellor, Daniel Webster, a man whom he called, "in his midnight denunciation, a traitor in 1808? Why in 1826 he paid a public compliment to Josiah Quincy,† in Faneuil Hall, whom he called a traitor the same year? And as the last question, why during the visits he has made to Boston, he always met in friendly and intimate and social terms all the gentlemen, whose names a few years before, he placed upon a secret record in the archives of our Government as traitors to their Country? Why did he eat their salt, break their bread and drink their wine?"

* Samuel Dexter.

† Josiah Quincy was born in Boston, February 4, 1772, was graduated from Harvard, 1790, was State Senator, 1804, and member of Congress, 1805-1813, State Senator, 1813, -14, -15, -16, -17, -18 and 1819. He was a member of the House in 1820 and 1821, and was Speaker in 1821. He was a member of the Constitutional Convention of 1820, a judge of the Municipal Court of the city of Boston, 1822, Mayor of Boston, 1823-1828 and President of Harvard, 1829-1845. He died in Quincy, July 1, 1864.

The letter of Mr. Jefferson referred to in this article, and published in the same issue of the Jackson Republican, stated that during the time of the Embargo Acts Mr. Adams called on Mr. Jefferson and stated
“ That he had information of the most unquestionable
“ certainty that certain citizens of the Eastern States,
“ (I think he named Massachusetts particularly) were
“ in negotiation with the agents of the British Gov-
“ ernment, the object of which was an agreement
“ that the New England States should take no further
“ part in the war then going on; that, without for-
“ mally declaring their separation from the Union of
“ the States, they should withdraw from all aid and
“ obedience to them; that their navigation and com-
“ merce should be free from restraint or interruption
“ by the British; that they should be considered and
“ treated by them as neutrals, and as such might con-
“ duct themselves towards both parties; and at the
“ close of the war be at liberty to rejoin this Confed-
“ eracy.”

It will be observed, however, that neither this letter of Mr. Jefferson, nor the statement of Mr. Adams referred to in this article as published in the National Intelligencer, and reprinted in the Jackson Republican, named any persons who had “engaged in a plot to dissolve the Union,” and yet the article said that
“ Mr. Adams distinctly asserts, that Harrison Gray

“ Otis, Samuel Dexter, William Prescott,* Daniel Webster, Elijah H. Mills, Israel Thorndike, Josiah Quincy, Benjamin Russell, John Welles,† and others of the Federal party, of their age, and standing, were engaged ‘in a plot to dissolve the Union,’ etc., and “that he, Mr. Adams, ‘possessed unequivocal evidence of that most solemn design.’” The article twice specifically named Daniel Webster, asking, why for three years he (President Adams) has “held to his bosom, as a political counsellor, Daniel Webster, a man whom he called in his midnight denunciation, a traitor in 1808;” also why President Adams has “always met in friendly and intimate and social terms all the gentlemen, whose names a few years before, he placed upon a secret record in the archives of our Government as traitors to their Country.”

* William Prescott was born in Pepperell, August 19, 1762, was graduated from Harvard, 1783, was a member of the House, 1798, -99, -1800, -1 and 1802, also in 1811, 1821 and 1823. He was a member of the State Senate in 1804, a member of the Governor’s Council in 1809, 1812 and 1813, a member of the Hartford Convention in 1814, a judge of the Court of Common Pleas for Suffolk County in 1818, 1819, and a member of the Constitutional Convention in 1820. In 1828 he retired from practice, when he was said by Mr. Webster to have been “unquestionably the most eminent man at the Bar in Massachusetts.” He died in Boston, December 8, 1844.

† John Welles was born in Boston, October 14, 1764, was graduated from Harvard, 1782, and became a merchant and largely interested in foreign trade. He was a member of the House in 1804, -5, -6, -7 and 1808, and in 1823 and 1830, State Senator in 1809, -10, -11, -12, -13, 1817 and 1820-1821, a member of the Governor’s Council in 1815 and 1816, and a member of the Constitutional Convention of 1820. He was a member of the first Common Council of Boston in 1822 and President of the Council in 1823. He died in Boston, September 25, 1855, in the ninety-first year of his age.

The gist of Mr. Webster's charge against Mr. Lyman was, that whereas Mr. Adams had only charged that leading Federalists of Massachusetts had in 1808 been guilty of treasonable designs to break up the Union, naming no one in particular, but libelling them all, Mr. Lyman had named Daniel Webster as a person to whom the libel of Mr. Adams applied, and thus made Adams's libel of all the leading Federalists of Massachusetts Lyman's own libel of Daniel Webster.

The defence of Mr. Lyman was in the first place that the article was not libellous, because, while Mr. Adams did not name any person specifically, he did charge *all* the leading Federalists with treasonable designs in 1808, and while he spoke particularly of those of Massachusetts, he really referred to all leading Federalists in New England, of whom, as Lyman said, Daniel Webster was then one.

In the second place, Mr. Lyman claimed that the article was not directed against Mr. Webster, but only against Mr. Adams; that he wrote the article hastily, forgetting that in 1808 Webster did not live in Massachusetts, and with no real intention of charging Mr. Webster with any treasonable plot, and that if he had done so in effect it was a mere inadvertence and mistake.

Fully to understand this case and the trial, it is

necessary to consider the condition of affairs in 1808, the conduct of the Federalists at that time and until the close of the War of 1812, the course pursued by Mr. Webster as to the Embargo Acts in 1808, and his subsequent course in opposition to the war with England.

The trial, as I have said, was an echo of the Napoleonic wars, of the victory of Nelson at Trafalgar, and of Napoleon at Austerlitz. Nelson destroyed the French and Spanish fleet at Trafalgar on October 21, 1805, and on December 1, 1805, Napoleon crushed the armies of the allies at Austerlitz. He then conceived the impossible scheme of shutting all English ports to the commerce of the world, and on November 21, 1806, issued the famous Berlin Decree, which prohibited all trade of neutral nations with England, or with any of her Colonies. The principal neutral trade of England then was in American ships. A treaty was pending between England and the United States, and England at once demanded that the United States should resist the Berlin Decree. To do this would have been, in fact, to join England in its war with France, and the United States Government declined to comply with this demand. The English Government at once broke off the treaty negotiations, and on January 7, 1807, issued an Order in Council prohibiting all neutral trade between the ports of France

or of any of her allies. November 14, 1807, a second English Order in Council was made, prohibiting all commerce between a country at peace and a country at war with England, except through some English port, under an English licence, and on payment of a duty to England. Napoleon met this on December 15, 1807, by issuing another decree, known as the Milan Decree. This decree declared that any ship that permitted an English officer to search it, made a voyage to England, or paid a tax to England, was lawful prize of war, and that any ship that went to or came from any port on its way to and from any port in the British possessions, or entered or left any place occupied by British troops, should be seized as prize of war wherever it might be found.

The United States was then, practically, only a sea-board nation, with infant manufacturing industries, which, under the protective tariff acts of the different States before 1787* (when Congress was first given power to impose a tariff upon foreign commerce) and the national protective tariff acts of 1789, had slowly struggled into existence; and its commerce by sea was

*See "An Act for laying additional duties on certain enumerated articles for encouraging the manufactory thereof within this State." Rhode Island Laws, 1785, General Session, p. 181.

An Act to encourage and protect manufactures of this State by laying additional duties on certain manufactures which interfere with them. Pennsylvania Laws, 1785, pp. 6, 69.

See also Report of the Committee for Encouragement of Manufactures. Massachusetts Laws, 1786, p. 411.

of the utmost importance to its prosperity, especially in New England. This commerce was by these Decrees and Orders in Council ground between the upper and nether millstones of England and France.

To meet this situation President Jefferson conceived a scheme, which proved even more hurtful to American commerce than the Napoleonic Decrees and the English Orders. It was nothing less than to prohibit all foreign commerce, and to make foreign trade by the United States a crime. He acted with unseemly haste, sending a special message of less than ten printed lines* to Congress, recommending an Embargo Act, December 18, 1807.

Gallatin, by far the ablest member of the Cabinet, remonstrated in writing, but Jefferson would heed nothing. He was then the supreme power in the Government. Whatever he commanded, Congress hastened to do. When his message was received in the Senate all other business was at once suspended. The message was referred to a committee of five, of whom John Quincy Adams was one, and in a few minutes the Committee reported an Embargo Act. Adams said, "I would not deliberate. I would act." And they did not deliberate. The rules were at once suspended, and in four hours from the reception of the message, a bill laying an unlimited embargo on all the ships

* *Messages of the Presidents*, vol. i, p. 433.

of the United States passed the Senate and was sent to the House of Representatives. There all amendments limiting the duration or effect of the Act were rejected, and three days later, on December 22, 1807, the bill was signed by the President,* and an unlimited prohibition placed upon all the foreign commerce of the United States.

No more foolish or injurious legislation was ever enacted by Congress. The effect upon commerce and business was immediate and disastrous, especially in New England, where six towns are said to have had more than one third of the total tonnage of the United States. The Embargo Act at once made this property nearly valueless. Sailors and all persons employed in shipping were thrown out of employment; products for exportation fell more than one half in value; farmers soon had no market for their products and no means of paying their debts. Of course, the law was evaded in many ways, and January 9, 1808, a further Act was passed, which put the coasting trade and the New England fisheries under onerous and almost prohibitory conditions.† This Act was also evaded, and March 12, 1808, another Act was passed, affecting foreign trade not only by sea, but by land.‡ This was also evaded, particularly along the Canadian border,

* United States Statutes at Large (1845), vol. ii, p. 451.

† United States Statutes at Large (1845), vol. ii, p. 453.

‡ United States Statutes at Large (1845), vol. ii, p. 473.

and April 19, 1808, Jefferson issued a proclamation declaring the country adjacent to Lake Champlain to be the seat of a combination against the laws of the United States, and calling the people "insurgents."*

April 25, 1808, another Act was passed still more stringent than the previous Acts.† Under this Act no ship could sail unless loaded in the presence of a revenue officer, nor without special permission from the President, and no boat, however small, (ferry-boats alone excepted,) could navigate any bay or river, sound or lake, without a clearance from the collector of some port. The effect was that a farmer could not even take his own wheat to market in his own boat and bring back the flour for his own use without a clearance and a bond to the collector. The transportation of provisions from port to port on the coast was practically prohibited. The whole New England coast was patrolled by armed vessels, the importation of flour into Boston was stopped, and preparations were made to put down any insurrection there by force. When the people of Nantucket asked for leave to bring in food, the President refused it, saying they must have smuggled away what they ought to have kept. He practically made himself commissary to the people, and decided what and how much they should eat. He

* Messages of the Presidents, vol. i, p. 450.

† United States Statutes at Large (1845), vol. ii, p. 499.

even declared that the character of a place must be considered, and if it were found to be tainted with the general spirit of disobedience, the individual who desired leave to transport merchandise must give positive proof that he had never said or done anything himself to countenance that spirit.

We can hardly realize now the pressure of these laws upon the people. Thousands failed, and the jails could hardly contain the poor debtors. In 1809, more than twelve hundred persons, ruined by the Embargo, are said to have been imprisoned as poor debtors in the city of New York alone. Places of business were closed, ships dismantled, and grass grew upon the wharves which before had been busy with profitable commerce. More than a hundred thousand men were thrown into idleness, and poverty and crime rapidly increased. The expenses of the Government increased, and its revenue from commerce fell in a single year from sixteen million dollars to only a few thousand dollars. State laws to stay the collection of debts were passed in direct violation of the national Constitution. The prosperity of the people was changed to ruin, their happiness to misery, and their hope to despair.

The result was not only evasion of the law, but forcible resistance at many points in New England. The people assembled, protected those whom the officers attempted to arrest, and drove off the officers

themselves. Juries refused to convict persons prosecuted under the Embargo Laws. Still Jefferson did not yield to the distress and resistance of the people, and at his command, January 9, 1809, Congress passed what was known as the "Force Act,"* with heavy penalties, one half to the informer. This made it a crime to carry or attempt to carry merchandise out of the United States in any way whatever, and made it unlawful to load any water-craft without leave of a United States collector, and under the direction of a United States inspector, and without giving a bond of six times the value of ship and cargo not to sail without permission. It also fixed the bond for leave to conduct commerce on any of the rivers, lakes, sounds and harbors at three hundred dollars a ton, and provided that all collectors who should find any goods of home manufacture or growth on any water-craft, or should find them in a wagon or vehicle going toward the seaboard or the boundary line of another country, should seize and hold them until bonds were given not to take them out of the United States. And finally the President was authorized to use so much of the army as he saw fit for enforcing the Act on the land, and to hire, arm and equip vessels to enforce it on the water.

A full and fair analysis of this Act and a state-

* United States Statutes at Large (1845), vol. ii, p. 506.

ment of its effect in Massachusetts will be found in the report of the joint committee of the Legislature made February 1, 1809, upon the petitions of towns including "an immense majority of the people of the Commonwealth" asking for relief from its effect, and in the "Address of the Legislature to the People of the Commonwealth of Massachusetts," issued at the same session. More than one hundred and thirty of these petitions are still preserved in the Archives of the Commonwealth and show how harshly this oppressive law was enforced by the President.

As to its effect the committee say:

"The merchant on the sea coast has abandoned his "enterprizes, and the trader in the country has lost "his customers, his debts and his credits. The ship "owner beholds the silent and certain ruin of pro- "perty, sufficient to carry on the principal trade of "the world. The work shop of the mechanick is de- "serted, and the ship builder is without employment. "The produce of the farmer has fallen in value; while "all the articles for which he depends on foreign na- "tions, have risen to a price which places them be- "yond his reach; and this misfortune will now be "aggravated by an unprecedented addition of duties. "The creditor from necessity presses on his debtor, "and the debtor beholds his property sacrificed at "half its value."

This address plainly threatened disunion and forcible resistance to the Embargo Acts if they were not repealed.*

No such arbitrary and oppressive act as the Force Act had been passed by Congress since the Alien and Sedition Acts of 1798, which wrecked the administration of John Adams; and the people rose against it, especially in New England, almost as one man. The voters assembled in town meetings, began to correspond with each other, and to provide for the appointment of committees of safety, and for conventions to consider whether it was not necessary to break up the Union to be relieved. The Legislature of Massachusetts at once passed a bill providing that any person making the searches provided for in the Force Act should upon conviction be punished with fine and imprisonment, but the Governor vetoed the bill.† They then passed resolutions declaring the Force Act to be "unjust, oppressive and unconstitutional," and declaring that Massachusetts was ready to coöperate with other States in legal measures for procuring such amendments to the Constitution as were "necessary to afford permanent security as well as present relief."

* "The Patriotic Proceedings of the Legislature of Massachusetts During their Session from January 26 to March 4, 1809." Printed by Joshua Cushing, 79 State Street, Boston, 1809, pp. 40, 114, 129.

† A copy of this bill from the State Archives is an Appendix hereto.

In Connecticut Governor Trumbull refused to appoint officers of the militia on whom the United States collectors could call for help, saying there was no authority for such appointments. He then called the Legislature together and declared to them that Congress had violated the Constitution, and that it was the duty of the States to protect the people from its action.

In Rhode Island the Custom-House authorities having called on the Governor for aid to enforce the Act, he called out four companies of militia, but they met only to declare they would not serve.

Popular indignation was most intense. The Embargo was called the "Dambargo," or, reversing its letters, the "O-grab-me," and the permits under it were called "Presidential Bulls and Indulgences." The press denounced it. Pamphlets were published and countless broadsides, caricatures and squibs were issued against it.

Disunion was openly and widely advocated and the pulpit gave expression to the feelings of the people by sermons from the text, "Wherfore come out from among them, and be ye separate, saith the Lord."

The Senators and Representatives from the New England States declared in Congress that the people were not bound to submit and would not sub-

mit to the Embargo Act. Timothy Pickering,* then in the Senate, said that the Revolution began in New England, "and one of the reasons assigned for the Declaration of Independence was the cutting off our trade with all the world."

Joseph Story,† then a member of Congress, afterwards Justice of the United States Supreme Court, said that if the embargo continued there was great probability of attempting to separate the Eastern States from the Union. All the New England statesmen were apparently of one mind with regard to the effect of the Embargo and Force Acts, and the people were with them, so that it did come to pass, as Jefferson afterwards said, that "the alternative was the repeal of the Embargo Acts, or Civil War."

Finally Jefferson yielded to the storm, and on March 1, 1809, a bill repealing the Embargo Acts

*Timothy Pickering was born in Salem, July 17, 1745, and was graduated from Harvard, 1763. He was Colonel in the Continental Army, 1775; Chief Justice, Essex County Court of Common Pleas, 1775; Judge of Maritime Court, Middle District, Massachusetts, 1776, 1777; appointed by Washington Adjutant-General, 1777; member of Board of War, 1777, 1778, 1779; Quartermaster-General, 1780; drew the Answer to Washington's Farewell Address to the Army, 1783; member of Pennsylvania Convention to ratify the United States Constitution, 1787; member of Convention to adopt new Constitution in Pennsylvania, 1789; Postmaster-General, 1791; Secretary of War, 1795; Secretary of State, 1796-1800; United States Senator from Massachusetts, 1803 to 1811; member of Congress, 1812-1816; member of Governor's Council, 1817, and died in Salem, January 29, 1829.

†Joseph Story was born in Marblehead, September 18, 1779, was graduated from Harvard, 1798, was a member of the House 1805, -6, -7, 1810 and 1811. He was Speaker in 1811, and resigned upon his appointment as Associate Justice of the United States Supreme Court, an office which he held until 1845. He was a member of the State Constitutional Convention in 1820, and died in Cambridge, September 10, 1845.

from and after the end of the next session of Congress, and providing for non-intercourse with France and England and their colonies, was passed by Congress and signed by him.* Three days later he ceased to be President, and retired to Monticello, whence he constantly meddled with public affairs without official responsibility, but fortunately with constantly decreasing influence.

But the repeal of the Embargo Acts did not relieve the people of the United States from the unjust and arbitrary conduct of England. She did not revoke her Orders in Council; she still continued to search our ships, blockade our ports, and impress our seamen,† until at last an indignant people forced the unwilling hand of President Madison, and June 18, 1812, Congress declared war with England, and we entered upon our second contest for independence.

This war necessarily caused extreme hardship to the New England States, and the Federalists there under the leadership of Timothy Pickering, who had failed of a re-election to the Senate in 1811, opposed its prosecution in every possible way.‡ The plan of a Northern Confederacy, proposed by Pickering,

* United States Statutes at Large (1845), vol. ii, p. 533.

† See Message of President Madison, June 1, 1812. Messages of the Presidents, vol. i, p. 499.

‡ See "Familiar Letters on Public Characters," p. 275, for account of meeting in Faneuil Hall, July 15, 1814, against the war, at which Josiah Quincy and Harrison Gray Otis were the principal speakers.

Plumer, Griswold, and Burr in 1804, and threatened in 1808 and 1809, was revived. This resulted in the famous Hartford Convention, held upon invitation of the Legislature of Massachusetts, which on October 18, 1814, "appointed twelve delegates to meet and "confer with delegates from the other States of New "England, or any of them, upon the subjects of their "public grievances and concerns," etc. Upon this invitation Connecticut appointed seven delegates, and Rhode Island four. These twenty-three met at Hartford, Connecticut, December 15, 1814, and admitted to the Convention two delegates chosen from local conventions in New Hampshire, and one from a local convention in Vermont. They were all of high personal character, some of them the most eminent men in their States.

George Cabot* of Massachusetts was chosen President, and Theodore Dwight of Connecticut Secretary. The Convention voted that its proceedings should be absolutely secret, and it continued in secret session until January 5, 1815, when it adjourned to meet at the call of the Chairman and one of two other delegates named.

*George Cabot was born in Salem, December 16, 1751. He was a member of the Convention of 1779-1780, which framed the State Constitution, and of the Convention which ratified the United States Constitution in 1788. He was a State Senator in 1782, a member of the House in 1805, of the Governor's Council in 1808, and was President of the Hartford Convention in 1814. He died in Boston, April 18, 1823.

While the Convention claimed to be acting within the provisions of the Federal Constitution, they practically adopted the doctrine that the States had a right to nullify the laws of Congress, and advised separate action by the States in important matters confided by the Constitution to the General Government. They prepared a long report recommending numerous amendments to the Constitution, among others amendments providing against the election of any person as President for more than one term, and against the election of a President from the same State for two successive terms,* prohibiting Congress from declaring war except by a two-thirds vote of both Senate and House, and prohibiting any naturalized citizen from holding any civil office under the United States.†

This report was transmitted to the Governor of Massachusetts, and on January 18, 1815, by him laid before the Legislature, which on January 27 adopted a resolve "highly approving" the proceedings of the Convention, and authorizing the Governor and Council to appoint three commissioners to proceed immediately to the seat of the National Government and make an application for some arrangement whereby "the State of Massachusetts sep-

* At that time the President had been chosen from Virginia for twenty-four out of the twenty-eight years during which the Federal Government had been established.

† *Massachusetts Resolves, 1815*, pp. 580, 590, 596.

“arately or in concert with neighbouring States may be enabled to assume the defence of their territories against the enemy,” and also on January 30 passed a resolve for paying the members of the Convention from Massachusetts for their attendance and travel.

In all this opposition to the Embargo Acts and to the war with England, Daniel Webster took an active and leading part. In 1808, he was practising law in Portsmouth, New Hampshire. He was a Federalist by inheritance, by disposition and by surroundings. He was a faithful disciple of Timothy Pickering, who instigated the Hartford Convention and practically guided its action. As soon as Webster was elected to Congress, and before he took his seat, in 1813, he wrote Mr. Pickering assuring him of his respect and placing himself under Pickering’s political guidance.* He was absolutely opposed to the policy and purposes of Jefferson and of Madison, and to the War of 1812. In a speech before the “Federal gentlemen” of Concord, New Hampshire, in 1806, he attacked the administration of Jefferson with great ability and force, and in 1808 he published a pamphlet which first brought him into political prominence, entitled, “Are the Embargo Laws Constitutional?”† This was put in evidence in the Lyman trial.

* Life of Timothy Pickering, vol. iv, p. 223.

† Writings and Speeches of Daniel Webster. Little, Brown & Co. edition, 1903, vol. xv, p. 562.

In July, 1812, he made a speech in opposition to the war with England, and in August of the same year he wrote what was known as the "Rockingham Memorial,"* addressed to the President, in opposition to the war. This memorial distinctly spoke of and practically threatened secession from the Union as the result of the conduct of the administration.

His first act upon taking his seat in Congress as a member from New Hampshire was to harass the Government by the introduction of resolutions calling for information as to the repeal of the French decrees, and by making a vigorous speech in opposition to the war.

December 9, 1814, Webster said in Congress that Congress had no power to raise armies by calling out the militia against the will of the States; and he added in words which had but one meaning, that of State resistance to the National Government:

"It will be the solemn duty of the State Governments to protect their own authority over their own militia and to interpose between their own citizens and arbitrary power. These are among the objects for which the State Governments exist. . . . And I shall exhort them to exercise their unquestionable

* Writings and Speeches of Daniel Webster, vol. xv, p. 598.

“right of providing for the security of their own
“liberties.”*

No word here of the power of the Federal Judiciary to decide this question—only an open and unqualified appeal to the doctrine of States' rights and a practical declaration of the right of the States to nullify the Acts of Congress. No wonder that such words were followed within one month by the declaration of the Hartford Convention that “In case of
“infractions of the Constitution affecting the sover-
“eignty of a State and the liberty of its people, it is
“not only the right but the duty of such a State to
“interpose its authority for their protection in the
“manner best calculated to secure that end. . . . In
“such emergencies States which have no common
“umpire *must be their own judges and execute their
“own decisions.*”

Webster voted constantly with Pickering, who was then in the House, and acted at all times with the ultra-Federalists, who had, as Mr. Adams charged, undoubtedly proposed in 1804, and again in 1808 and in 1814, to break up the Union and form a separate Confederacy of the New England and other Eastern States.† Even after the British Army had entered

* The Letters of Daniel Webster, p. 67. C. H. Van Tyne.

† See Letters of Pickering to Theodore Lyman, February 11, 1804, and November 14, 1804; to Stephen Higginson, December 24, 1803; to Rufus King, March 4, 1804; and other correspondence on the subject of a North-

Washington and burned the White House and the Capitol, Mr. Webster voted against taxes to carry on the war, and also spoke and voted against an act to enlist soldiers and raise men by draft to defend the Country, taking the ground that the General Government under its powers "to raise armies" could only obtain troops by contracts of enlistment, or by calling on the States to furnish militia.

He also spoke and voted against the establishment of a United States Bank, with power to issue notes in such a way as to aid the Government in carrying on the war. In short, he constantly opposed the Government, by voice and vote, in the war against England,—"our second war of independence."

A man is known by the company he keeps; and it is not strange that Mr. Lyman, writing in 1828, should have named Webster with the men with whom he had thus constantly acted.

Mr. Webster, however, with whom love of the Union had then become an absorbing passion, and who had long ceased to have any sympathy with the ultra-Federalists with whom he had acted, and who had contemplated disunion, was naturally highly incensed by Mr. Lyman's article in the Jackson Republican. He at once employed Charles P. Curtis,*

ern Confederacy, printed in Henry Cabot Lodge's Life and Letters of George Cabot.

* Charles Pelham Curtis was born in Boston, June 25, 1792, was graduated

then the City Solicitor of Boston, and Richard Fletcher,* one of the most eminent members of the Bar, to ascertain who wrote the article, and upon application to the publishers of the paper, they were informed on November 1 that the article was written by Theodore Lyman, Jr.

Webster and Lyman were former political associates, and had been personal friends and neighbors from the time Mr. Webster came to Boston. They were on intimate social terms, met usually several times a week, and had for years belonged to a dinner club that met every Saturday. It would have been a very simple matter for Mr. Webster to have asked Mr. Lyman for an explanation as to whether he intended to charge him with having been engaged in a plot to break up the Union in 1808. If this had been done, a satisfactory disclaimer would doubtless have been made, as subsequent events well show.

Boston was at that time a small place. It had no gas in its streets, no railroads or street railways, and no telegraph, and its only water supply was a line of log pipes from Jamaica Pond. The Post-Office had but eight clerks, and the town had only four notaries,

from Harvard, 1811, attained distinction at the Bar, was a member of the Legislature in 1838 and in 1842, and died in Boston, October 4, 1864.

* Richard Fletcher was born in Cavendish, Vermont, January 8, 1788, was graduated from Dartmouth, 1806, studied law with Daniel Webster, was member of Congress, 1837-1839, and an Associate Justice of the Supreme Judicial Court, 1848-1853. He died in Boston, June 21, 1869.

three assessors, and one savings bank. It still elected many of the old town officers. It had two pound-keepers, four fence-viewers, and three hog-reeves, and its directory had a separate list of "people of color." Its residences still had gardens and yards with shrubs and trees. Its residential and business quarters were so limited that all persons in Mr. Webster's and Mr. Lyman's station in life were practically near neighbors, and necessarily met frequently. They all lived near one another. Webster first lived on Mount Vernon Street, and then on Somerset Street, not far from Mr. Lyman, who lived on Bowdoin Street, and Judge Orne, who lived on Hancock Street. Josiah Quincy, the Mayor, lived in Hamilton Place, while his son, Josiah Quincy, Jr., lived at 4 Park Street, and had his office at 16 Court Street. Benjamin Russell, editor of the Centinel, lived on Pearl Street, and Isaac Pray, foreman of the Grand Jury, who found the indictment against Lyman, lived on Purchase Street. Samuel Hubbard lived in Bumstead Place, from which there was then a view of the Brookline hills, and had his office in Barristers Hall, next the Court House on School Street; while James T. Austin lived in Fayette Place, or Colonnade Row, on the east side of the Common, and had his office in the Court House; and the Solicitor-General, Daniel Davis, lived on Somerset Street. Harrison Gray Otis

lived at 20 Beacon Street; William Prescott lived in Bedford Street, and had his office in Court Street; while John Davis,* United States District Judge, lived in Federal Street, near Mr. Webster. Warren Dutton lived in Fayette Place, and had his office in Barristers Hall. Richard Fletcher lived at the "Exchange" in Congress Square, and had his office at 26 State Street; and Franklin Dexter, then a representative in the General Court, lived at 3 Chauncey Place, near Summer Street. John Welles, John Lowell,† Jonathan Callender, Clerk of the Supreme Court, Charles P. Curtis, Chief Justice Parker, Israel Thorndike, and Daniel Webster all lived on Summer Street; and doors were cut between the

* John Davis was born in Plymouth, January 25, 1761, was graduated from Harvard in 1781, was a member of the Conventions of 1788 and 1800, was a member of the House in 1792, -93, -94, and a State Senator in 1795. In 1801 President Adams appointed him District Judge of Massachusetts, an office which he held for forty years. He died in Boston, January 14, 1847.

He decided in the Embargo cases that the Embargo Law was constitutional, and when Samuel Dexter persisted in arguing the question of constitutionality to the jury, he threatened to commit him for contempt. Mr. Dexter then asked postponement until the next morning, to which Judge Davis assented. In the morning Mr. Dexter stated to the Court that he had arrived at a clear conviction that it was his duty to argue the constitutionality of the Embargo Law to the jury, and should do so regardless of the consequences to himself; and he did so without any further interference by the Court.

† John Lowell was a son of John Lowell who was born in Newbury, June 17, 1743, was graduated from Harvard, 1760, was a member of the House, 1780, -81, -82, and a member of the Convention which framed the State Constitution in 1779-1780. He was a member of the Continental Congress, 1782-1783, and a State Senator in 1784-1785. He was United States District Judge, 1789-1801, and Chief Justice of the United States Circuit Court for Maine, Massachusetts, New Hampshire and Rhode Island, 1801-1802, when the Court was abolished. He died in Roxbury, May 6, 1802.

houses of Webster and Thorndike, so that they were used together for receptions and other large social gatherings.* The only Catholic church, the Church of the Holy Cross, was in Franklin Street. The First Church was in Chauncey Place, and the New South Church and Trinity Church were in Summer Street. The Boston Athenæum was in Pearl Street, and the principal theatre was in Federal Street.

The actors in this matter were all members of a small social circle, and on excellent social terms; and if only personal considerations had been involved, it is impossible to believe that any prosecution would have been instituted by Mr. Webster against Mr. Lyman.

But Webster and his political friends were bitter against Lyman because he had left them and was supporting Andrew Jackson for President, whom they regarded as the representative of everything that was bad and dangerous in politics. The opportunity to punish Lyman, put him in the criminal dock, and probably to convict him of a crime was too tempt-

* Webster came to Boston from Portsmouth, New Hampshire, August 14, 1816, and for a short time boarded with Mrs. Delano. He then rented a house of Mr. Mason on Mount Vernon Street, where he lived until December, 1819. His daughter Julia was born and his daughter Grace died in this house. He then moved to Somerset Street, where he lived until 1822, when he took lodgings in Pearl Street, living a part of the time in Dorchester, which was then a country suburb. In November, 1824, he moved into the Thorndike house at the corner of Summer and High streets. This spot is now covered by a large mercantile building bearing a tablet, "The Home of Daniel Webster."

ing to be lost. No explanation of the article was asked of Mr. Lyman, and naturally none could be given by him unasked. Twelve days after the article was published, Mr. Webster through his counsel presented the article as a criminal libel to the Grand Jury in the Supreme Judicial Court, and they at once returned an indictment against Mr. Lyman for criminal libel against Mr. Webster in his office as a Senator of the United States from Massachusetts.

The character of this prosecution was itself unjust to Mr. Lyman. Mr. Webster could have brought a civil action against him for damages, and the facts could have been brought out in that as well as in a criminal prosecution, except that, as the law then was, neither Webster nor Lyman, being parties, could have testified. In a criminal prosecution Webster could testify, while Lyman could not, so that by the form of the prosecution Webster closed Lyman's mouth, while he himself retained the right to testify, and did testify.

The fact that the prosecution was instituted in the Supreme Judicial Court, the highest Court in the Commonwealth, instead of in the Municipal Court, which then had jury trials and had as a judge the best criminal law lawyer in the Commonwealth,* and

* Peter Oxenbridge Thacher, Judge of "The Municipal Court in the Town of Boston" from 1823 to 1843. This Court had jurisdiction of all criminal cases not capital.

where prosecutions for libel were usually brought, is also significant of the motive of the prosecution. A trial in the Municipal Court would not be so effective upon the public mind at large as one in the highest Court, and therefore the usual course was not taken.

The character of the indictment was also most unusual and, I believe, unprecedented in Massachusetts. It was framed upon a precedent under the law of *scandalum magnatum*, or slander of great men, an offence adopted into the English law in the Star Chamber prosecutions, but never adopted as a part of the common law of the United States. It was manifestly calculated by its harsh and unnecessarily vituperative terms to put the utmost indignity upon Mr. Lyman. It is wholly in the handwriting of Daniel Davis,* the Solicitor-General, and is as follows:

“ COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

“ At the Supreme Judicial Court, begun and holden
“ at the City of Boston, within the said County of

* Daniel Davis was born in Barnstable, May 8, 1762. He was appointed United States District Attorney by Washington in 1796, was a member of the House in 1789, -90, 1792, -93, -94 and 1795, State Senator in 1796, -97, -98, -99 and 1800, a member of the Constitutional Convention of 1820, and Solicitor-General from 1807 to 1832, when the office was abolished. He died in Cambridge, October 27, 1835.

His son, Charles H. Davis, became a Rear-Admiral in the United States Navy, and was the father of the wife of Henry Cabot Lodge, United States Senator from Massachusetts. His daughter, Louisa, married William Minot, an eminent trust lawyer of Boston.

“ Suffolk, and for the Counties of Suffolk and Nan-
“ tucket, on the second Tuesday of November, in the
“ year of our Lord one thousand eight hundred and
“ twenty-eight.

“ The Jurors for said Commonwealth of Massachu-
“ setts upon their oath present, that Theodore Ly-
“ man, Jr. of Boston, in the said County of Suffolk,
“ Esquire, being a person of malicious temper and
“ disposition, and regardless of the integrity, patriot-
“ ism, and purity of character, which the citizens of
“ this Commonwealth, and of the United States, when
“ elected to, and intrusted with offices of honor, trust
“ and responsibility, in the administration of the gov-
“ ernments of this Commonwealth, and of the United
“ States, ought to possess and sustain; and unlaw-
“ fully, maliciously and deliberately, devising, con-
“ triving and intending to traduce, vilify and bring
“ into contempt and detestation, one Daniel Web-
“ ster, of said Boston, Esquire, who was on the day
“ hereafter mentioned, and still is one of the Sena-
“ tors in the Congress of the United States of Amer-
“ ica, for the State of Massachusetts, duly, and con-
“ stitutionally, elected and appointed to the office,
“ and also, maliciously intending to insinuate, and
“ cause it to be believed, that the said Daniel Web-
“ ster, and divers other good and patriotic citizens, of
“ this Commonwealth, had been engaged in an atro-

“cious, and treasonable plot to dissolve the Union
“of the said United States, then, and still constitut-
“ing the Government of the said United States, un-
“der the present Constitution thereof; and further,
“maliciously intending to insinuate, and cause it to
“be believed, that John Quincy Adams, the present
“President of the United States, *had denounced the*
“*said Daniel Webster, as a traitor to his Country*; on
“the twenty-ninth day of October, now last past, at
“Boston aforesaid, in the County of Suffolk afore-
“said, unlawfully, maliciously and deliberately, did
“compose, print and publish, and did cause and pro-
“cure, to be composed, printed and published, in a
“certain newspaper called the Jackson Republican,
“of and concerning him, the said Daniel Webster,
“an unlawful, malicious, and infamous libel, accord-
“ing to the purport and effect, and in substance, as
“follows, that is to say, ‘We, (meaning the said
“Theodore Lyman, Junior,) publish this morning a
“letter of December, 1825, of Mr. Jefferson, to Mr.
“Giles, and Mr. Adams’s (meaning John Quincy
“Adams, the present President of the United States,)
“own statement, published last week in the National
“Intelligencer, at Washington, concerning disclo-
“sures said many months ago, to have been made
“by Mr. Adams, (meaning the said John Quincy
“Adams,) to Mr. Jefferson, (meaning Thomas Jef-

“ ferson, late of the State of Virginia,) in regard to
 “ the conduct of the leader of the Federal party, in
 “ New England, during the whole course of the com-
 “ mercial restrictive system. Mr. Adams (meaning
 “ the said John Quincy Adams) confirms in his state-
 “ ment, in a positive and authentic form and shape,
 “ the very important fact, that, in the years 1807 and
 “ 1808 he, (meaning the said John Quincy Adams,)
 “ *did make such disclosures.* The reader will observe,
 “ that Mr. Adams, (meaning the said John Quincy
 “ Adams,) distinctly asserts, that Harrison Gray Otis,
 “ Samuel Dexter, William Prescott, Daniel Web-
 “ ster, (meaning the aforesaid Daniel Webster,)
 “ Elijah H. Mills, Israel Thorndike,* Josiah Quincy,
 “ Benjamin Russell, John Welles, and others of the
 “ Federal party, of their age, and standing, were

*Captain Israel Thorndike was born in Beverly, April 30, 1755, was apprenticed as a cooper, became a privateer during the Revolution, and as a successful merchant captain and owner of ships attained wealth after the war. He was a member of the Massachusetts Legislature in 1788, and a member of the Constitutional Convention of 1788, which ratified the Federal Constitution. He was a member of the House in 1802, -3, -4, -5, -6, 1808 and 1815, and a member of the State Senate in 1807 and 1809, -10, -12, -13 and 1814. He was a Presidential Elector in 1812 and in 1816, and a member of the Constitutional Convention in 1820. He removed to Boston from Beverly about 1800, and by judicious investments in manufactures and real estate became the richest man in the city. He was active in business and politics until his death, May 10, 1832, when he left an estate appraised at \$1,133,401.52, the largest fortune which up to that time had been left in New England. He was a firm friend and patron of Webster, who lived next door to him on Summer Street for many years.

His son, Israel Thorndike, Jr., built, at the corner of Beacon and Joy streets, one of the finest houses in the city, which he afterwards sold to Robert G. Shaw, whose son, G. Howland Shaw, married the youngest daughter of Theodore Lyman. This house was afterwards the home of Frederic Tudor and its site is now occupied by the Hotel Tudor.

“engaged in a plot to dissolve the Union, (meaning the Government of the said United States,) and “to re-annex New England to Great Britain; and “that he (Mr. Adams,) (meaning the aforesaid John Quincy Adams) possessed *unequivocal evidence, of that most solemn design.* The reader will, also, observe, that in the statement just published, of Mr. Adams, (meaning the said John Quincy Adams,) “there is no intimation whatever, that he, (meaning the said John Quincy Adams,) *does not still believe, what he, (meaning the said John Quincy Adams,) revealed to Mr. Jefferson,* (meaning the aforesaid Thomas Jefferson,) *and Mr. Giles, twenty years ago.* All the gentlemen we (meaning the said Theodore Lyman, Junior,) have mentioned “above, are, with one exception, still living and, with “two exceptions, are *active and ardent political friends of Mr. Adams,* (meaning the said John Quincy Adams.) We (meaning the said Theodore Lyman, Junior,) here beg to ask, why Mr. Adams’s (meaning the said John Quincy Adams,) statement, has been “withheld from the public eye more than a year? “why it has been published only one fortnight before the election for President all over the country? why for three years he (meaning the said John Quincy Adams,) has held to his (meaning the said John Quincy Adams) bosom, as a political counse-

“ lor, Daniel Webster, (meaning the aforesaid Daniel Webster,) a man whom he (meaning the said John Quincy Adams,) called in his (meaning the said John Quincy Adams,) midnight denunciation, a traitor in 1808? (meaning the said John Quincy Adams, had called and denounced the said Daniel Webster, as a traitor to the government of the United States, in the year 1808?) Why in 1826, he (meaning the said John Quincy Adams,) paid a public compliment to Josiah Quincy, in Faneuil Hall, when he (meaning the said John Quincy Adams,) who called a *traitor*, (meaning traitor) the same year? and as the last question, why, during the visits he (meaning the said John Quincy Adams,) has made to Boston, he (meaning the said John Quincy Adams,) always met on friendly and intimate and social terms all the gentlemen, (meaning gentlemen, and the said Daniel Webster as one of them,) whose names a few years before, he (meaning the said John Quincy Adams,) placed upon a secret record in the archives of our Government as traitors to their Country? (meaning that the said John Quincy Adams had placed the name of the said Daniel Webster, with others, upon a secret record in the archives of the Government of the United States, as a traitor to his Country,) why did he (meaning the said John Quincy Adams,) eat

“ their salt, break their bread, and drink their wine?”
“ To the great injury, scandal, and disgrace of the
“ said Daniel Webster, and against the peace and
“ dignity of the Commonwealth aforesaid.
“ And the jurors aforesaid, upon their oath aforesaid,
“ do further present that the said Theodore Lyman,
“ junior, being a person of a malicious temper and
“ disposition, and regardless of the integrity, patri-
“ otism, and purity of character, which the citizens
“ of this Commonwealth and of the United States,
“ when elected to, and entrusted with offices of honor,
“ trust, and responsibility in the administration of
“ the government of this Commonwealth and of the
“ United States ought to possess and sustain; and
“ unlawfully, maliciously, and deliberately devising,
“ and intending to traduce, vilify, and to bring into
“ contempt and detestation, one Daniel Webster, of
“ said Boston, Esquire, who was, on the day herein-
“ after mentioned, and still is, one of the Senators in
“ the Congress of the United States of America, for
“ the State of Massachusetts, duly and constitution-
“ ally elected and appointed to that office; and also
“ maliciously intending to insinuate and cause it to
“ be believed, that the said Daniel Webster, and
“ divers other good and patriotic citizens of the Com-
“ monwealth, had been engaged in an atrocious and
“ treasonable plot to dissolve the union of the United

“ States, then and still constituting the Government
“ of the United States under the present Constitu-
“ tion thereof; and further intending maliciously to
“ insinuate and cause it to be believed that John
“ Quincy Adams, the present President of the United
“ States, had denounced the said Daniel Webster as
“ a traitor to his Country; on the twenty-ninth day
“ of October now last passed, at Boston aforesaid, in
“ the County of Suffolk aforesaid, unlawfully, mali-
“ ciously, and deliberately did compose, print, and
“ publish, and did cause and procure to be composed,
“ printed, and published, in a certain newspaper called
“ the Jackson Republican, of and concerning him
“ the said Daniel Webster, an unlawful, malicious,
“ and infamous libel, according to the purport and
“ effect, and in substance as follows, to wit, ‘We’
“ (meaning the editors and publishers of the said
“ newspaper, called the Jackson Republican) ‘pub-
“ lish this morning a letter of December, 1825, of
“ Mr. Jefferson to Mr. Giles, and Mr. Adams’s’ (mean-
“ ing John Quincy Adams, the present President of
“ the United States,) ‘own statement published last
“ week in the National Intelligencer, at Washington,
“ concerning disclosures said, many months ago, to
“ have been made by Mr. Adams’ (meaning the said
“ John Quincy Adams) ‘to Mr. Jefferson,’ (meaning
“ Thomas Jefferson, late of the State of Virginia,)

"in regard to the conduct of the leaders of the
 "Federal party, in New England, during the whole
 "course of the commercial restrictive system. Mr.
 "Adams' (meaning the said John Quincy Adams)
 "confirms in his statement, in a positive and authen-
 "tic form and shape, the very important fact that,
 "in the years 1807 and 1808, he' (meaning the said
 "John Quincy Adams) *'did make such disclosures.*
 "The reader will observe, that Mr. Adams' (mean-
 "ing the said John Quincy Adams) 'distinctly as-
 "serts, that Harrison Gray Otis, Samuel Dexter,
 "William Prescott, Daniel Webster,' (meaning the
 "aforesaid Daniel Webster) 'Elijah H. Mills,* Israel
 "Thorndike, Josiah Quincy, Benjamin Russell, John
 "Welles, and others of the Federal party, of their age
 "and standing, were engaged in a plot to dissolve
 "the Union,' (meaning the Government of the said
 "United States) 'and to re-annex New England to
 "Great Britain; and that he Mr. Adams' (meaning
 "the said John Quincy Adams) *'possessed "unequiv-
 "ocal evidence" of that most solemn design.* The reader
 "will also observe, that in the statement just pub-
 "lished of Mr. Adams,' (meaning the said John

*Elijah Hunt Mills was born in Chesterfield, December 1, 1778, was
 graduated from Williams, 1797, practised law at Northampton, was one of
 the Hampshire Convention Committee which issued an address against
 the Embargo, March 2, 1809, was a member of the House in 1810, -11, -12,
 -13 and 1814, a member of Congress in 1815, -16, -17 and 1818, a member
 of the House in 1819, -20 and Speaker in 1820, and was United States
 Senator, 1820-1827. He died in Northampton, May 5, 1829.

“Quincy Adams) ‘there is no intimation whatever,
“*that he*’ (meaning the said John Quincy Adams)
“‘does not still believe *what he*’ (meaning the said
“John Quincy Adams) ‘*revealed to Mr. Jefferson*
“*and Mr. Giles twenty years ago*. All the gentlemen
“*we*’ (meaning the editors and publishers of the said
“newspaper, called the Jackson Republican) ‘have
“mentioned above, are, with one exception, still liv-
“ing, and, with two exceptions, are *active* and *ardent*
“political friends of Mr. Adams,’ (meaning the said
“John Quincy Adams). ‘*We*’ (meaning the said
“editors and publishers of the said newspaper, called
“the Jackson Republican) ‘here beg to ask, why Mr.
“Adams’s’ (meaning the said John Quincy Adams)
“‘statement has been withheld from the public eye
“more than a year? why it has been published only
“one fortnight before the election for President all
“over the country? why, for three years, *he*’ (mean-
“ing the said John Quincy Adams) ‘has held to his
“bosom, as a political counsellor, Daniel Webster,’
“(meaning the aforesaid Daniel Webster), ‘a man
“whom he called in his midnight denunciation, a
“traitor, in 1808,’ (meaning that the said John Quincy
“Adams had called and denounced the said Daniel
“Webster as a traitor to the Government in the year
“1808.) ‘Why, in 1826, *he*’ (meaning the said John
“Quincy Adams) ‘paid a public compliment to Jo-

"siah Quincy, in Faneuil Hall, when he' (meaning
 "the said John Quincy Adams) 'who called a traitor'
 "(meaning a traitor), 'the same year? And as the
 "last question, why, during the visits he' (meaning
 "the said John Quincy Adams) 'has made to Boston,
 "he' (meaning the said John Quincy Adams) 'al-
 "ways met on friendly and intimate and social terms
 "all the gentlemen' (meaning the said Daniel Web-
 "ster as one of them) 'whose names, a few years be-
 "fore, he' (meaning the said John Quincy Adams)
 "'placed upon a secret record in the archives of our
 "Government, as traitors to their Country?' (mean-
 "ing that the said John Quincy Adams had placed
 "the name of the said Daniel Webster, with others,
 "upon a secret record in the archives of the Govern-
 "ment of the United States.) 'Why did he' (mean-
 "ing the said John Quincy Adams) 'eat their salt,
 "break their bread, and drink their wine?'
 "To the great injury and disgrace of him, the said
 "Daniel Webster, and against the peace and dignity
 "of the Commonwealth aforesaid.

"DANL. DAVIS, *Solicitor General.*

"A true bill, ISAAC C. PRAY, *Foreman.*

"A true Copy, attested, JNO. CALLENDER, *Clerk.*"

On November 17, Mr. Lyman appeared with his counsel, Samuel Hubbard and Franklin Dexter, and was arraigned. The Clerk said, "Theodore Lyman junior, hearken to an indictment found against you by the Grand Inquest for the body of this County." The indictment was then read to him by the Clerk.

The Clerk then said, "What say you, are you guilty, or not guilty?" to which Mr. Lyman said, "Not guilty."

The quaint record by the Clerk on the back of the indictment is

"SUFFOLK, ss.	Nov. 17, 1828
"Arraigned & has this indictment	
"read to him & being asked thereof	
"he saith thereof he is not guilty	
"JNO. CALLENDER	
"Clerk."	

Mr. Lyman then recognized for his appearance for trial. The record on the indictment is:

"Def. recognizes for his appearance from day to day during the session of this Court in the sum of \$1000. himself alone."

Lyman's counsel then moved for a continuance to the March term, 1829, and in support of the motion filed the following affidavit drawn by Mr. Dexter:

“SUFFOLK, ss. SUPREME JUDICIAL COURT,
“NOVEMBER TERM, 1828.

“COMMONWEALTH *vs.* THEODORE LYMAN, JR.

“THE said Theodore Lyman, Jr., makes oath and says that this indictment was found against him at the present term of this Court, and that he has had only five days notice thereof, and was not able to procure a copy thereof until three days ago. That immediately on obtaining such copy, he advised with his Counsel respecting the answer he should make to the same. That his said Counsel have had the same matter under consideration, and now advise him that the several matters therein charged to have been published by said Lyman are not libellous if the same were neither wilfully false nor maliciously contrived and intended to defame the said Daniel Webster, both of which the said Lyman wholly denies. The said Lyman is further advised that he may lawfully give in evidence on the trial of said indictment, the truth of the several matters contained and alleged in said supposed libel, as a justification thereof, and that he cannot safely proceed to trial on this point of his defence without evidence of a great variety of facts relating to the political history of the United States for more than twenty years last past, and to the part taken therein by the said Daniel Webster, and the

“ other persons named in the said supposed libel.
“ That it will be necessary for him to prove, among
“ other things, that John Quincy Adams, the Presi-
“ dent of the United States, composed and published,
“ or caused to be composed and published, in the
“ newspaper called the National Intelligencer, the
“ statement said in that paper to be authorized by
“ him and referred to in said supposed libel, and that
“ the said Thomas Jefferson did write to the said
“ William B. Giles the letter also referred to in said
“ supposed libel; and that the said Daniel Webster
“ was one of the description of persons referred to
“ by said Adams as engaged in a course of opposi-
“ tion to the General Government, which, in the
“ opinion of said Adams, tended to produce a forc-
“ ible resistance against said Government and a civil
“ war, in which the persons so spoken of by him would
“ surely call in the aid of Great Britain against the
“ Government of the United States; and also as per-
“ sons whose object was to dissolve the Union of the
“ United States and establish a separate confederacy,
“ by the aid of Great Britain, if necessary.
“ Whereupon the said Lyman further says, that to
“ prove the truth of the matters aforesaid, numerous
“ facts will be important, which took place before he
“ was himself of an age to have personal knowledge
“ of the political affairs of the country or of the in-

“dividuals who had the management of the same,
“and which it will require much time to investigate;
“that the said matters involve inquiries of an ancient
“date, to be made of various aged persons in distant
“parts of the United States, whose attendance it will
“not be possible for said Lyman to procure at the pre-
“sent term. But the facts of which the said Lyman is
“already informed and which he is advised are mate-
“rial to this part of his defence, are as follows, viz. :—
“The said Lyman believes and expects to prove that
“the said John Quincy Adams did in fact write and
“publish, or cause to be written and published in the
“said National Intelligencer, the said statement re-
“ferred to in said supposed Libel, and this said Lyman
“expects to prove either by Gales and Seaton, the ed-
“itors of said National Intelligencer, or one of them,
“or by the said John Quincy Adams, all which per-
“sons are now without this Commonwealth, and can-
“not be procured to attend the trial at this Term;
“but the said Lyman further says that he has a rea-
“sonable expectation that the said John Quincy Ad-
“ams will return within this Commonwealth in season
“to attend the trial at the next Term of this court.
“And the said Lyman further believes and expects
“to prove, that the persons so referred to, by said Ad-
“ams, as aforesaid, were the eminent men of a cer-
“tain political party in New England, then known as

“the Federal party: and that the said Daniel Webster was in and about the year 1808, and for many years after that time, an eminent and conspicuous member of said Federal party, and being a person of distinguished talents and influence, and enjoying the general confidence of the said Federal party, did participate in, and by means of his said talents and influence greatly urge and promote the measures of opposition to the embargo and restrictive system, then pursued by the General Government, and deemed so injurious and oppressive to this section of the Union, which facts said Lyman expects to prove by divers persons resident in the State of New Hampshire, but of whose names and residence, said Lyman is not yet informed, but said Lyman’s reason for believing that he can prove the same is, that the same are things commonly reported and believed, but the said Lyman is not yet informed (nor can he during the present term procure such information together with the other evidence necessary to his defence) who are the persons who know said facts of their own knowledge. And the said Lyman further expects to prove and verily believes that said John Quincy Adams did, on or about the year 1808, write to divers persons then high in office in the Government of the United States, and among others to William B. Giles, then a mem-

“ ber of Congress from the State of Virginia, sun-
 “ dry secret and confidential letters, or make other
 “ confidential communications denouncing the said
 “ Federal party, or the leaders thereof, as engaged in
 “ treasonable projects of resistance to the General
 “ Government, and for dissolving the Union. The
 “ said Lyman’s reasons for believing and expecting
 “ to be able to prove that said Adams did so write,
 “ or communicate, are deduced from said Adams’s
 “ said statement, said Lyman expects to prove the
 “ same, at the next Term, by the said Adams’s own
 “ testimony, or that of said William B. Giles, who is
 “ an aged and infirm man, and cannot attend the trial
 “ at this Term; and by other persons to whom the said
 “ Adams wrote, or communicated as aforesaid, but
 “ who are not resident in this Commonwealth, and
 “ are at present unknown to said Lyman.

“ And the said Lyman further says that he expects
 “ and believes that he shall be able to obtain all the
 “ evidence aforesaid in season for a trial at the next
 “ term of this court.

“ THEODORE LYMAN, JR.

“ SUFFOLK, ss. *Sworn to in Court Nov. 17, 1828.*

“ JNO. CALLENDER, *Clerk.*”

James T. Austin,* who was the Commonwealth’s

* James Trecothic Austin was born in Boston, January 7, 1784, was graduated from Harvard in 1802, was Town Advocate in Boston in 1809, a member of the Constitutional Convention in 1820, State Senator in 1825, 1826 and

Attorney, or as the office is now termed, District Attorney, for Suffolk County, and Richard Fletcher, a leading member of the Bar, and intimate friend of Webster, appeared for the Commonwealth, and Chief Justice Parker postponed the hearing of the motion until the next day, when the Solicitor-General, Daniel Davis, appeared and filed the following objections to the affidavit of Lyman.

“SUFFOLK, ss. SUPREME JUDICIAL COURT. NOVEMBER TERM, 1828.

“COMMONWEALTH *vs.* THEODORE LYMAN, JR.

“*Objections to the affidavit of defendant as a ground of the motion for a continuance.*

“THE defendant does not state in the affidavit that “the publication originated in mistake, or misapprehension; nor does he in any manner disavow an intention of publishing anything derogatory to the character of Mr. Webster.

“Nor does he, in a direct and unequivocal manner, state that he can, or expects to, prove the truth of the matter alleged to be libellous or any part of it.

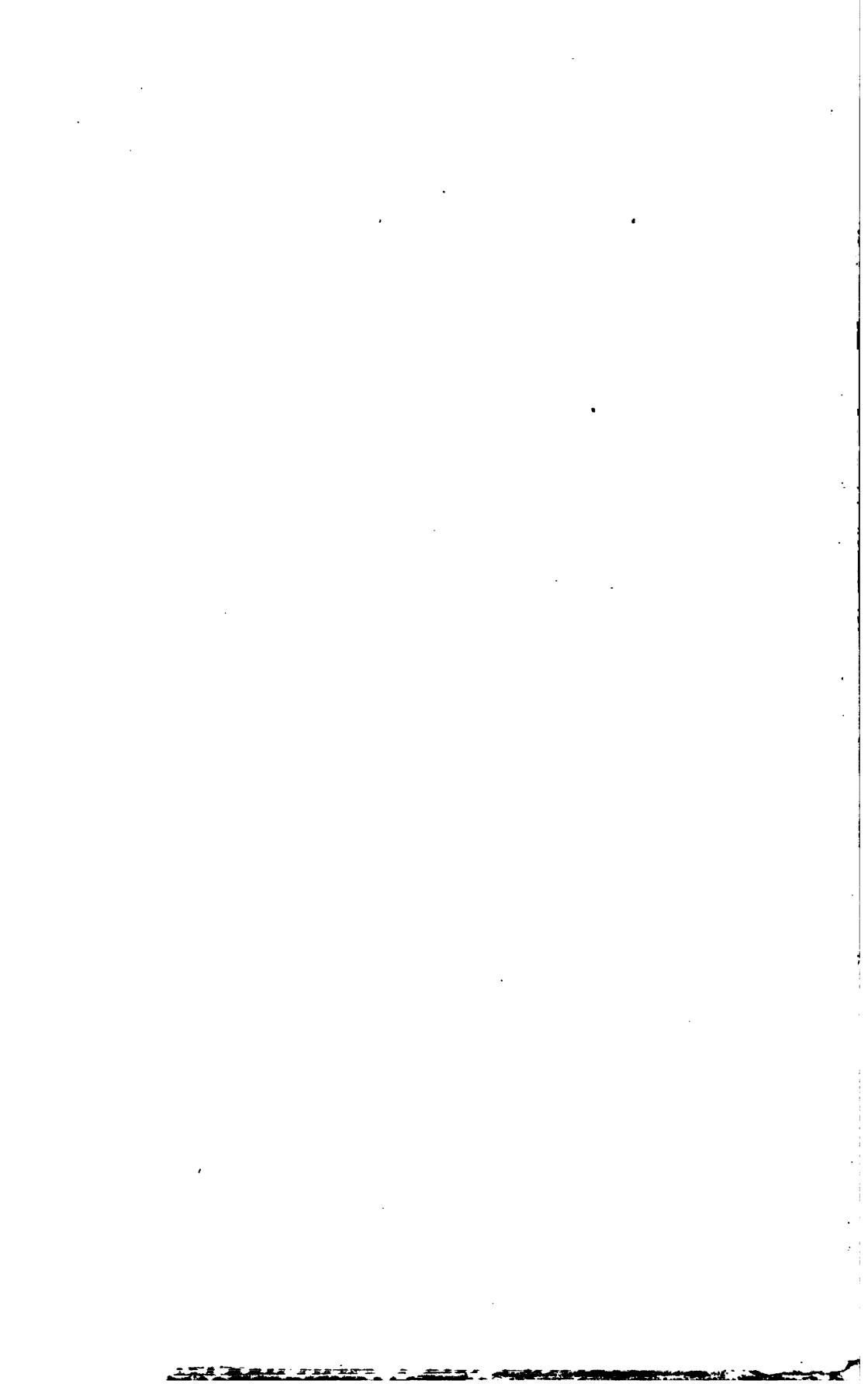
“He does not swear in any part of the affidavit that he himself believes that what he published is true. The matter charged as libellous is ‘that Mr. Adams distinctly asserts that Mr. Webster (with others) were engaged in a plot to dissolve the

1832, and Attorney-General from 1832 to 1843, when the office was abolished. He died May 8, 1870.



DANIEL DAVIS

From a Painting in the possession of Captain Charles Henry Davis, U. S. N.



“ Union, and re-annex New England to Great Brit-
“ ain; and that Mr. Adams possessed unequivocal
“ evidence of that most solemn design.’ But the de-
“ fendant does not swear that he expects to be able
“ to prove that Mr. Adams ever in fact made such
“ an assertion; nor does he declare that such an as-
“ sertion if made was true.

“ The publication alleges that ‘Mr. Adams has
“ placed the name of Mr. Webster (with others) upon
“ a secret record in the archives of our Government,
“ as traitors to their Country.’—But the defendant
“ does not state that he expects to prove it.

“ The defendant swears that he is advised that he
“ may give in evidence the truth of the several mat-
“ ters contained in the alleged libel, but he does not
“ swear that he expects to be able to prove the truth
“ of them or any part of them.

“ The affidavit states the necessity of making re-
“ searches into the history of the country, and of
“ consulting aged persons, &c. but the defendant
“ does not swear that he expects that such researches
“ and enquiries will furnish any evidence that Mr.
“ Adams made any such assertion as to Mr. Webster
“ as the libel states, or that Mr. Adams did in fact
“ place the name of Mr. Webster on the records and
“ among the archives of our government as a traitor
“ to his country, as the libel alleges. After the sev-

“ eral introductory matters contained in the affidavit,
“ the defendant proceeds to state ‘ that to prove the
“ matters aforesaid, numerous facts will be impor-
“ tant, which took place before the defendant was of
“ an age to have personal knowledge of political af-
“ fairs’; but these matters aforesaid do not relate to
“ the ‘ matters ’ stated in the libel; but other general
“ and wholly irrelevant matters.

“ As to all these statements in the affidavit, the de-
“ fendant neither swears that he believes the charges
“ in the libel are true, nor that he expects to be able
“ to prove them; nor that he expects to prove that
“ Mr. Adams made the assertions imputed to him.

“ The defendant then swears that he expects to prove
“ the following facts:

“ 1. That Mr. Adams did write and publish the article
“ in the National Intelligencer referred to in the sup-
“ posed libel. The fact will be admitted on the trial.

“ 2. That the persons referred to by Mr. Adams were
“ eminent men in a certain political party in New
“ England—but he does not state the absence of any
“ witness necessary to prove this—and if he should
“ the fact will be admitted.

“ 3. That Mr. Webster was in and about the year
“ 1808, a member of the Federal party, and did use
“ and promote the measures of opposition to the em-
“ bargo and restrictive system, but this, if proved,

“ has no relation whatever to the libellous matter before stated. But it will be admitted on the trial, “ that in 1808 Mr. Webster, in the political divisions “ of those times was a Federalist; that so far as the “ open expression of opinions against the embargo, “ and non-intercourse, constituted opposition to those “ measures, he did oppose them. And if the defendant means that he opposed them by any other means or measures of opposition, they ought to “ have been stated in the affidavit.

“ 4. The affidavit states that the defendant expects “ to prove that Mr. Adams, in the year 1808, wrote “ letters to persons high in office or made other confidential communications, denouncing the Federal “ party or leaders thereof, as engaged in treasonable “ projects. But defendant does not swear that he expects to prove that said communications, if made, “ included the name of, or had any reference to Mr. “ Webster. The ground of belief in this respect, is “ alleged to be the publication of Mr. Adams before “ referred to; but that publication affords no ground “ or pretense for such belief, because it refers wholly “ to persons in Massachusetts,—nor is it alleged in “ the affidavit, that defendant expects to prove that “ Mr. Webster in 1807 and 1808 was one of the “ leaders of the Federal party in Massachusetts. “ Lastly, if the defendant will swear, that he him-

“ self believes that the matters contained in his publication and charged in the indictment as libellous, “ are true; or that he expects to be able to prove “ them to be true, the Solicitor General will agree to “ a continuance, without the defendant’s being obliged “ at this time, to state particularly by what evidence “ he expects to prove them.

“ And therefore, the Solicitor-General moves the Court that the following interrogatories may be put to the defendant, and that the said interrogatories and defendant’s answers may be made a part of his affidavit.

“ 1. *Interrogatory.* Do you expect to be able to prove that Daniel Webster in the years 1807 and 1808, entered into a plot to dissolve the Union, and re- annex New England to Great Britain?

“ 2. *Interrogatory.* Do you expect to prove that John Quincy Adams ever asserted that Daniel Webster entered into a plot as stated in the preceding interrogatory?

“ 3. *Interrogatory.* Do you expect to prove that Mr. Adams ever denounced Mr. Webster as a traitor in 1807 and 1808, or that he ever placed his name as a traitor to his Country, upon any record among the archives of the Government of the United States?

“ 4. *General Interrogatory.* Do you expect to prove

“that the matter charged as libellous in your publication so far as respects Mr. Webster, is true?”

The Solicitor-General also filed the following statement of what he would admit upon the trial.

“COMMONWEALTH *vs.* THEODORE LYMAN, JR.

“THE Solicitor General will admit at the trial of the above cause the following facts:

“1. That Mr. John Quincy Adams did publish the statement ascribed to him, and printed in the National Intelligencer.

“2. That the printed letter of Mr. Jefferson to Mr. Giles, was written by and to said persons, dated 25 Dec^r. 1825.

“3. That Mr. Webster in 1808 was an eminent and conspicuous member of the Federal party &c. &c. *in the terms of the affidavit.*

“4. That Mr. Adams wrote such letters to Mr. Giles and others, as he, Mr. Adams, says in his said statement he wrote to Mr. Giles and others.

“But it is not admitted that Mr. Webster was comprehended or included in the terms of Mr. Adams’s statement.”

Mr. Lyman declined to answer the interrogatories of the Solicitor-General, and on November 24, Chief Justice Parker denied the motion for a continuance, and the case was then by consent of counsel assigned

for trial on December 15, when it was postponed until December 16.

The distinguished character of the parties, as well as the political considerations attending the case, gave dignity and interest to the trial. A prosecution for criminal libel in which Daniel Webster was the prosecutor and Theodore Lyman, Jr., the defendant, and in which charges made by the President of the United States against the most distinguished citizens of Massachusetts were involved, necessarily caused intense public interest. The prosecution, though in form a criminal prosecution by the Commonwealth against Lyman, was in reality a personal and political suit by Webster against Lyman, and was so treated by the public and the press. Washington papers even treated it as a private suit by Webster. The National Intelligencer of November 22, 1828, said: "Mr. Webster has issued a writ against Theodore Lyman, Jr., Esq., editor of the Boston Jackson Republican, for designating him by name, as one of those members of the Federal party of Massachusetts, to whom Mr. Adams has attributed treasonable projects."

The trial began December 16, at half past nine o'clock in the forenoon. Mr. Webster was present with his friends, and the court room was crowded with leading Federalists and prominent citizens of Boston.

Mr. Webster was then forty-six years of age, and in the plenitude of his power. He had served four years in Congress as a member of the House from New Hampshire. He was a Presidential Elector and the most prominent member of the Massachusetts Constitutional Convention in 1820, a member of the House in 1822, and had served nearly four years as a member of Congress from Massachusetts. The previous June he had been chosen a Senator in the United States Senate from Massachusetts, but had not taken his seat. He had argued the Dartmouth College case, and other equally important cases in the Supreme Court of the United States, and had delivered the wonderful orations at the anniversary of the landing of the Pilgrims at Plymouth, the laying of the corner-stone of Bunker Hill Monument, and the eulogy on Adams and Jefferson. He had also made other speeches and arguments and delivered other orations which firmly established his reputation, not only as the most distinguished citizen of Massachusetts, but as one of the ablest lawyers and the most eloquent orator of the United States.* His reputation had become not only national, but international, and he had

* Webster argued the Dartmouth College case in 1818; *McCulloch vs. Maryland* in 1819, and delivered the oration on the landing of the Pilgrims in 1820. He made his speech on the Greek revolution and argued the case of *Gibbons vs. Ogden* in 1824; he delivered the oration at the laying of the corner-stone of the Bunker Hill Monument in 1825, and the eulogy on Adams and Jefferson in 1826.

already taken on that lordly manner best known as "Websterian." He had become a personal political force in the Commonwealth, and his control of affairs was such that the prosecuting officers of the State seem to have been mere instruments in his hands in the prosecution of Mr. Lyman.

Mr. Lyman himself was not an unknown man. He was not, as Mr. Curtis calls him, simply "a gentleman of high social standing," but was also one of the most accomplished and eminent citizens of the Commonwealth. Born in 1792, he was graduated from Harvard College in 1810, and then studied in the University of Edinburgh. He had done excellent literary work, publishing "The Political State of Italy," in 1820, and "The Diplomacy of the United States," in 1826. He had been from 1820 to 1828 on the staff of the Governor of the Commonwealth with the rank of General, and from 1828 to 1827, he had commanded the "Boston Brigade." He had also been a prominent member of the House in 1820, 1821, 1822, 1823 and 1825, and in 1824 he was a State Senator. He wrote a vigorous style inherited perhaps from his father,* who in 1795 wrote to Timothy Pickering of their political opponents in Boston: "They

* Mr. Lyman's mother was a niece of Timothy Pickering, and his father, Theodore Lyman, was a son of Rev. Isaac Lyman, who was graduated from Yale in 1747, and was pastor of the church at Old York, Maine. One of his sisters married Samuel A. Eliot, and was the mother of Charles W. Eliot, President of Harvard College.

yelp and howl and trumpet treason at every corner."* His subsequent life showed the kind of man he was. In 1834 and 1835 he was Mayor of Boston, and first promoted the introduction of pure water into the city. While he was Mayor he protected Catholics from a brutal Protestant mob, and at great personal risk protected abolitionists from a pro-slavery mob in 1835. He became President of the Boston Farm School, and of the Prison Discipline Society, and in 1846 he anonymously gave ten thousand dollars to aid in establishing the State Manual Labor School.† When he died, in 1849, he gave by his will fifty thousand dollars to aid this school, making with his other gifts to the school seventy-two thousand five hundred dollars, and also gave ten thousand dollars to the Boston Farm School.

It required courage of a high order for a gentleman of Mr. Lyman's social and political standing to advocate the election of Jackson in Massachusetts in 1828. Jackson was regarded by most of the educated and well-to-do people in Massachusetts as an ignorant and dangerous man, the embodiment of all that was bad in political life. The great social, financial and political influences of the community were

* Life of Timothy Pickering, vol. iii, p. 178.

† This school was opened at Westboro, November 1, 1848, as the "State Reform School," but in 1885 its name was changed to the "Lyman School for Boys at Westboro."

opposed to him, and all these influences were naturally arrayed against Mr. Lyman in this trial. The very atmosphere of Boston was hostile to him because he was for Jackson.*

But Mr. Lyman, although a refined, sensitive man, was a man of high spirit, and he did not flinch from the attack of Webster, but went through the ordeal of the trial with the steady courage of a gentleman.

The trial was in what was then the "New Court House" on School Street, sometimes called "Johnson Hall," on the site of the present City Hall,† and was conducted in that orderly and dignified method of judicial procedure which is the distinguishing mark

* The Jackson electors received only 6016 votes out of a total vote of 35,892 in Massachusetts. In Boston they received only 846 out of a total of 4106; Garrison Gray Otis and William Prescott, candidates of "certain Federal gentlemen," received 147 votes, and the Adams electors received 3113.

† There was then an "Old Court House" on Court Street, which was first called Prison Lane, because the first prison was built upon it, where the present Old Court House now stands. In 1708 this Lane was called Queen Street. Afterwards this prison was taken down, and a new stone prison, called "The Gaol," was erected on its site. This was burned January 30, 1769, and the first Court House of brick, three stories high, with a cupola and a bell, was then built on the site. In this building all the Courts of law were held until the Court House, sometimes called "Johnson Hall," was built on School Street, in 1810. The Court House on Queen Street, or, as it had then been named, Court Street, was then called "The Old Court House." A gaol had then been built in the space between the Old Court House on Court Street and the New Court House on School Street, on the site of the old "Poor Debtors' Gaol." In 1833 a Court House on Court Street was built on the sites of the Old Court House of 1769 and the Gaol. This was completed in 1836, and occupied by all the Courts until 1891, when the present Court House in Pemberton Square was completed and occupied by the Courts, and the Court House on Court Street again became "The Old Court House."

of the administration of justice by the English-speaking race.

Isaac Parker, Chief Justice of the Supreme Judicial Court, presided, Daniel Davis, Solicitor-General, appeared for the prosecution, Samuel Hubbard* and Franklin Dexter (a son of Samuel Dexter of the Hartford Convention) appeared for Mr. Lyman. The jurors summoned, from whom the jury for the case were to be drawn, were present. The Clerk said: "Theodore Lyman, Jr., you are now to be tried, and "these good men whom I shall call are to pass be- "tween the Commonwealth and you upon your trial. "If you object to any of them, you must do it as "they are called, and before they are sworn."

The names of the following jurors were then drawn by the Clerk, and they answered to their names. No objection was made by Mr. Lyman to any of them. The names of the jurors, with their occupations and residences as shown in the Boston Directory of 1828, are as follows:

WILLIAM B. SWETT, Merchant, Foreman, 16 Custom House Street;

FRANCIS HALL, Distiller, 560 Washington Street;

THOMAS HUNTING, Merchant, 6 Orange Place;

*Samuel Hubbard was born in Boston, June 2, 1785, was graduated from Yale, 1802, was a member of the House in 1816, -17, 1820 and 1831, a member of the Constitutional Convention of 1820, State Senator in 1823, 1824 and 1838, and an Associate Justice of the Supreme Judicial Court from 1842 until his death in Boston, December 24, 1847.

CHARLES LANE, Merchant, 53 Brattle Street;
WYMAN HARRINGTON, Mason, 8 Warren Street;
BENJAMIN BROWN, Painter, 6 Hawkins Street;
JOHN G. VALENTINE, Upholsterer, 13 Poplar Street;
NATHANIEL H. WHITAKER, Auctioneer, 14 Province House Court;
JONAS B. BROWN, Merchant, 1 Brattle Square;
CHARLES R. ELLIS, Merchant, 691 Washington Street;
FREDERICK GOULD, Clothing store, 172 Ann Street;
ALBERT SMITH, Saddler, Chambers Street.

The jurors then took the following oath, the Clerk saying:

“ Hold up your right hands: You do each of you “ solemnly swear that you shall well and truly try “ the issue between the Commonwealth and the de-“ fendant according to your evidence, so help you “ God.” *

The Clerk said: “ Gentlemen of the Jury, hearken to an indictment found against the Defendant by the Grand Inquest for the body of this County.” And then the long indictment was read to the jury by the Clerk.

Solicitor-General Davis opened the case for the prosecution by saying, “ The character and standing “ of the parties, as well as the nature of the allegations “ against Mr. Webster, give the trial a peculiar inter-

* *Massachusetts Laws, 1807, ch. 140. Commonwealth vs. Anthes, 5 Gray, 275.*

“est. The high character of the defendant in this
“prosecution is well known to the jury. He has been
“before the public in offices of honor and trust, and is
“deservedly esteemed, not only by his own more in-
“timate acquaintances, but by the whole public, and
“had this attack been only of an ordinary kind, usual
“in the common newspapers of the day, no public
“prosecution would have been instigated. . . .

“But the accusation is of a high and aggravated na-
“ture, and through the columns of the Jackson Re-
“publican has a circulation coextensive with *his* name
“which gives the title to the paper itself. It is against
“a Senator of the United States, and, indirectly, im-
“plicates the character of the Nation. Mr. Webster is
“a member of the Senate of the United States, a re-
“presentative of the sovereignty of Massachusetts at
“the national councils. In his character, therefore, the
“Commonwealth is peculiarly interested. . . .

“Mr. Webster is accused of one of the highest crimes
“—there is no degree of depravity deeper than that
“which exists in the bosom of a traitor. He has chil-
“dren and friends interested in wiping away the stain
“created on the escutcheon of his reputation by so
“foul a charge. The public good requires an exami-
“nation into it, and the reputation of our State at the
“seat of government imperiously demands a thorough
“investigation of its truth or falsehood. The free-

" dom of the press, one of the greatest blessings of a
 " free nation, has been abused full often, and imperi-
 " ously requires to be controlled and repressed, espe-
 " cially when consequences and evils like those in this
 " case press upon the public peace and quiet. Espe-
 " cially where papers are set up, not for the purpose
 " of a diffusion of general knowledge and science, or
 " mere circulation of political information, but for
 " express and personal political objects, and purity
 " of character is invaded and the rights of individuals
 " wantonly outraged it is the duty of the guardians
 " of the public peace to repress such abuse of the
 " freedom of the press.

" If this is not done the consequences will be the
 " breaking up of the foundations of civil society, vio-
 " lent and deadly contests and one wide scene of con-
 " fusion, disorganization and blood will ensue. The
 " only place of redress against such outrage and
 " wrong is *here* at the laws and before a jury of the
 " country. The offence of libelling in all ages and in
 " every civilized country has been punished with
 " marked severity, and in Greece and Rome it was an
 " offence of high magnitude."

The Solicitor-General then analyzed the indictment and alleged libel and stated the law applicable to the case.

Upon the close of the opening argument the Solici-

tor-General put in evidence a certificate from the Speaker of the House, of June 7, 1827, and a certificate of the Secretary of the Commonwealth, showing the election of Mr. Webster as Senator in the United States by the State Legislature.

He then called Francis O. Dawes as a witness, who said he was a student in the office of Charles P. Curtis, and on October 31, at the request of Mr. Curtis, he called at the office of the Jackson Republican, and purchased a copy of the Republican, containing the alleged libel upon Mr. Webster. He produced the paper, which was put in evidence and is still upon the files of the Court, wrapped in the original indictment.

The Solicitor-General then called John Putnam, who testified that he was one of the publishers of the Jackson Republican, that Mr. Lyman was one of the proprietors, and that it had an extensive circulation, principally in New England, but more or less in every State and in the city of Washington.

The Solicitor-General then said he had introduced the libel, proved its publication and its author, and therefore for the present he should rest the cause on the part of the Government.

Mr. Franklin Dexter* then made the opening

* Franklin Dexter was born in Charlestown, November 5, 1793, was graduated from Harvard in 1812, studied law with Samuel Hubbard, and married a daughter of William Prescott. He was a member of the Legislature in 1824,

statement for Mr. Lyman, saying that he should be extremely brief, as it was the wish of all concerned that the case should occupy but one day. He said: " We shall endeavour to satisfy the jury that Mr. Lyman never intended to libel Mr. Webster, and " that the prosecution originated in a mistake, but " still as the prosecution has now met us, we must " be prepared to encounter it upon its legal and just " merits though on the part of the defendant it is a " subject of regret. The question the jury have to " decide is of a grave nature, for it concerns the freedom of the press and the rights which individuals " have to discuss questions of political moment. " Many of the public whom curiosity has drawn together at this trial may be disappointed. They may " expect strange developments relative to former " political events, but no such developments will be " given, and I believe little will arise to gratify this " curiosity. . . . It may have seemed from the affidavit filed in this case by Mr. Lyman that he intended to justify himself by proving the truth of his allegations, as at the present day the truth may " be given in evidence, and by a recent statute of the Commonwealth amount to a complete justification.

1825, 1828 and 1840, a State Senator in 1835 and United States District Attorney, 1841-1845 and in 1849. He was one of the most eminent lawyers and advocates of his time, and was leading counsel for the defence in the White murder trial when Webster appeared for the prosecution in 1830. He died August 14, 1857, at Beverly.

“tion. Still, notwithstanding that affidavit, it is not
“intended to attempt to justify on the ground of the
“truth of the statements set forth in the indictment,
“and I do not believe that if the continuance for
“which the affidavit was filed had been granted, the
“defence would have been the truth of the allegations
“set forth in the indictment. The defence in substance
“is that the matter published by General Lyman
“was not in itself libellous so far as Lyman was
“concerned, and that General Lyman had no ma-
“licious intent. The charge against the defendant is
“both serious and novel. It is not only, as is usual
“and perhaps necessary, that he published a ‘false
“and malicious’ libel, but that General Lyman was
“an evil disposed person, and, intending to defame
“Mr. Webster, published a false, malicious and *infa-*
“*mous* libel. The word ‘scandalous’ is common, but
“my brother and myself have searched for a long
“period among the precedents of the present and
“past ages, and can only find two cases where the
“word ‘infamous’ has ever been used in an indict-
“ment of this nature.

“General Lyman did not intend to bring Mr. Web-
“ster into disrepute. All he intended to say was that
“Mr. Adams charged the prosecutor, Mr. Webster,
“with having been a traitor, and that he, Adams,
“had placed upon the records of the archives of the

“ Government certain New England Federal leaders
“ as traitors, and that Mr. Webster, the prosecutor,
“ was one of them. The only thing which General
“ Lyman has done is to give an interpretation to the
“ assertion, undoubtedly intended on the part of Mr.
“ Adams. He has only given the names of those per-
“ sons intended by Mr. Adams to have been meant,
“ and has merely given a direction to the intended
“ object of the calumny of another. The persons said
“ to have been libelled with Mr. Webster in the arti-
“ cle written by General Lyman are his personal
“ friends. Mr. Lyman in the old divisions of parties
“ was a Federalist, and all those named in the in-
“ dictment as equally libelled with Mr. Webster, al-
“ though Mr. Webster has been alone selected as
“ libelled, are the personal friends, and were formerly
“ the political friends, of General Lyman. Is it prob-
“ able that Mr. Lyman intended to hold up to pub-
“ lic detestation such men, his friends, who are in
“ daily personal union with him, that he should be
“ on such terms with men whom he was willing thus
“ *infamously* to libel? The expressions of Mr. Adams
“ alluded to *all* the leading Federalists of New Eng-
“ land, and would apply as well to New Hampshire,
“ where Mr. Webster was then a leading Federalist,
“ as to Massachusetts. General Lyman had nothing
“ to do with politics until 1819, and then upon his

“return from Europe he found Mr. Webster an active and leading Federalist in Boston. It probably escaped his recollection in hastily penning a newspaper paragraph that in 1808 Mr. Webster resided in New Hampshire, but however that may be, Mr. Webster was a leading Federalist in 1808 and opposed to the Embargo and virtually embraced in “the denunciation of Mr. Adams.”

As to the suggestion that Mr. Lyman might have explained that he did not intend to libel Mr. Webster, Mr. Dexter said that a prosecution was openly threatened on the part of Mr. Webster, and was a subject of common conversation before even the name of the author of the article was asked, and under such circumstances he appealed to the jury to say whether it would not have been degrading to General Lyman to offer any apology rather than to do as he had done—“submit his cause and motives to a jury of his Country.”

Mr. Dexter then introduced evidence for the defence. He first produced a certain pamphlet which he said was written by Mr. Webster, called “Considerations on the Embargo Laws,” and offered it, or extracts from it, in evidence. The Solicitor-General said he was ignorant of its contents, and should object to its being put in evidence without its being read entire.

Mr. Dexter then called Daniel Webster for the defence and asked him whether he wrote the pamphlet which was shown to him. He said he had written a pamphlet with that title, and from this and its size he presumed it was the same. It was probably written in the summer of 1808.

Mr. Dexter then asked him concerning his authorship of the Rockingham Memorial. Mr. Webster said that question related to the year 1812, and he was not bound to acknowledge every passage he had ever written, whether anonymous or not. That Memorial, however, he said was written by a Committee of which he was chairman; how far the writing or sentiments were written by himself, or how much they were modified by various members of the Committee, he could not then tell. At all events, he said, he assented to all contained in that Memorial at that time, and to the proceedings of the meeting.

Some discussion ensued as to the reading of the whole pamphlet, whereupon Chief Justice Parker observed that the time to be embraced in reading it was material; that he had no doubt but that Mr. Webster wrote as strongly against the embargo as any one could. To this Mr. Webster, speaking from his seat, said, "I meant to." The Chief Justice then continued, that for himself he thought the Embargo Act unconstitutional, and asked counsel for Mr. Ly-

man if the pamphlet tended to show that Mr. Webster was one of the individuals intended by the observations of Mr. Adams. Mr. Hubbard replied that it was alleged by Mr. Adams that an intention existed on the part of the leading Federalists in New England from the year 1808 down to the close of the war, to sever the Union and re-annex themselves, or the New England States to Great Britain. Mr. Webster was then one of the leading Federalists of New England, and consequently one of those charged by Mr. Adams. The Embargo pamphlet, and the Rockingham Memorial acknowledged by Mr. Webster to have been written principally by himself, went to show this fact. If this was apparent, then there was no malice on the part of General Lyman in classing Mr. Webster with other distinguished Federalists in New England.

The Solicitor-General asked if they intended to prove the truth of the allegations by producing the pamphlet, and that Mr. Webster was engaged in a treasonable plot to dissolve the Union. If so, they had better read it; if not, it was better, in Scottish parlance, "to keep their breath to blow their broth."

The Chief Justice said that if the constitutionality of the Embargo were on trial, he should be glad to hear the pamphlet read.

Mr. Dexter then offered the Rockingham Me-

morial in evidence, which the Court ruled was inadmissible as inapplicable to the issue.

Mr. Dexter then put in evidence the previous numbers of the Jackson Republican, to show that Mr. Webster had never been named in any article therein written by Mr. Lyman.

Judge Henry Orne,* one of the publishers of the Jackson Republican, then testified that Mr. Lyman had written a number of articles in the Republican which did not mention Mr. Webster; that the article embraced in the indictment was written by Mr. Lyman; that the object of the Republican was to oppose the reëlection of John Quincy Adams; that it circulated more or less in most of the States; that about one thousand copies were printed, but not all distributed; that he communicated the fact that Mr. Webster claimed that the article was libellous to Mr. Lyman on the thirty-first of October, when he received a letter from Fletcher and Curtis asking who wrote it.

Benjamin Russell † was then called for the defence,

* One of the judges of the Boston Police Court.

† Benjamin Russell was born in Boston, September 13, 1761, and learned the trade of printer in the office of Isaiah Thomas. He was a private in the Revolutionary Army, and in 1784 established the Columbian Centinel of which he was editor for more than forty years. He was a member of the House in 1805, -6, -7, -8, -9, -10, -11, -12, -13, -14, -15, -16, -17, -18, -19, -20 and 1821, State Senator in 1822 and 1825, a member of the Legislature in 1824, 1828, -29, -30, -31, -32, -33 and in 1835, a longer legislative service than that of any other person in Massachusetts. He was a member of the Governor's Council in 1836 and 1837 and of the Constitu-

and testified that he had heard Mr. Webster say he intended to prosecute soon after the publication of October 29 in the Republican; that he then asked Mr. Webster if the article did not contain a libel, and Mr. Webster replied that he should try to make it so, or ascertain the fact, or words to that effect. Russell said that he felt proud to be in such company as he was ranked amongst in that libel.

Henry Williams then testified for the defence, saying he told Mr. Lyman he had heard that Mr. Webster was about to institute a suit against him on the twenty-ninth or thirtieth of October, and that it was the general report at Merchants' Hall Reading Room.*

James T. Austin was called for the defence, and testified that on the first of November, as prosecuting officer for the Government, he received a letter which he was requested to lay before the Grand Jury as a complaint against Mr. Lyman, for a libel on the Hon. Daniel Webster; that the letter was brought

tional Convention of 1820. He was for eight years a member of the Board of Aldermen of Boston, Commander of the Ancient and Honorable Artillery, and held many other important municipal offices and positions in charitable and military organizations, and was the author of the terms "Gerrymander" and "Era of good feeling." He died in Boston, January 4, 1845.

* Merchants' Hall was a brick four-story building at the corner of Congress and Water streets, having on the first floor the Post-Office and a subscription reading-room furnished with the principal United States and foreign newspapers, books for daily news, announcements of arrival and sailing of vessels, maps, prices current, "and a good clock." Bowen's Boston, p. 34.

to him by Mr. Curtis, and after he had read it he advised Mr. Curtis to go with it directly to the Supreme rather than to the Municipal Court. Mr. Curtis said he was not aware that the Supreme Court had jurisdiction, but after he had satisfied him on the fact that it had, Mr. Curtis took the letter away and afterwards followed the course he had pointed out.

Mr. Dexter then introduced other articles published in the Republican, one being an article headed "Political," and signed "A Pennsylvanian," which were furnished by Mr. Lyman, and related to Mr. Adams's assertions and to the subject matter commented on by Mr. Lyman in his article which was said to be libellous.

Judge Orne was again called to the stand and stated that at the first establishment of the Republican a number of pamphlets and papers were sent "from the Southward" to the paper, and that Mr. Lyman had taken or made such selections as he deemed fit from them; that he had no conference with Mr. Lyman previous to the writing of the article, but he had seen it previous to its publication.

Mr. Dexter then stated as admitted by the Government that Mr. Lyman was graduated at Harvard College in 1810, being then eighteen years of age; that he went to Europe in 1812 and returned in 1814; that he went to Europe again in 1817 on account of

his health and returned in 1819, and took no part in politics until the winter of 1819 and 1820.

Warren Dutton* then testified for the defence that he saw the publication on Wednesday after it was published; that on Friday in the Mall † he met General Lyman and from him understood that Mr. Webster complained of the publication. He understood Mr. Lyman to say that he did not intend to libel any one; Mr. Webster, General Lyman and himself were on friendly terms, and frequently were together in a friendly association, and he never knew any difficulty between Mr. Lyman and Mr. Webster. He said Mr. Lyman was a Federalist in the old divisions, and on good terms with Mr. Otis, Mr. Thorndike, etc., named in the article, and was a connection of Mr. Otis.

* Warren Dutton was born in East Haddam, Connecticut, in 1774, was graduated from Yale, 1793, was tutor in Yale and in Williams, and studied law with John Lowell, whose daughter he married in 1806. He was editor of the Palladium, 1801-3, admitted to the Bar in 1803, and delivered the oration before the Town Authorities, July 4, 1805. He was a member of the House in 1809, -10, 1820, and a State Senator in 1821, -22. In 1820 he was a member of the Constitutional Convention, and in February, 1821, was one of the managers on the part of the House, in the impeachment of James Prescott, Judge of Probate for Middlesex, and made the closing argument against Webster who was counsel for Prescott. He was an accomplished man, an eminent lawyer and an intimate personal friend of Theodore Lyman. He died in Brighton, March 3, 1857.

† In 1780 the Mall was on the eastern side of the Common, in length 1410 feet and divided into two walks parallel to each other, separated by a row of trees. On the outside of each walk was also a row of trees which agreeably shaded it. In 1807 it was a public walk 600 yards in length. Now (1904) it is that part of the Common next to Tremont Street, under which is the Subway.

This closed the testimony for the defence.

The Solicitor-General then called Mr. Webster for the prosecution, who testified that in 1807 he was a resident in New Hampshire, and came to Boston, August, 1816; that in the years 1808 and 1809 he had no personal or political acquaintance with the persons named in the alleged libel, though while a student at law in Boston he knew Messrs. Otis and Prescott by sight and reputation, and not otherwise. The Solicitor-General then asked Mr. Webster this question: "Did you at that, or any other period, ever enter into any plot to dissolve the Union?" To which Mr. Webster answered: "No, sir." Mr. Webster then apparently without being questioned proceeded to say that he would "state the transactions relative to the alleged libel as they transpired." He said: "On the day of the publication, or the next, I "was in the Suffolk Insurance office and my attention from the conversation there was drawn toward "the article. It was also thus in other offices, and in "conversation with gentlemen on the street. From "this conversation and from the connection of General Lyman with the Republican I had some reason "to believe that he might possibly be the author. I "distinctly stated at about this period that I should "not prosecute the publishers of the paper for this, "what I should call, atrocious libel, for I had ob-

“served that the paper was printed for the proprietors, but that when I should find out who the proprietors were, I should give them an opportunity to prove the truth of the assertions. I then called upon Messrs. Curtis and Fletcher as my counsel, to inquire of the publishers of the Republican to know the author of the piece in question. I then directed my attorneys to inquire as to the jurisdiction of the Municipal or Supreme Judicial Court of the offence. This was two or three days previous to the sitting of the Municipal Court and ten or twelve days previous to the session of the Supreme Judicial Court. Nothing was then done or said by me until I was satisfied that General Lyman knew I intended to have a legal investigation. No explanation was given by General Lyman, although in my opinion Mr. Lyman was satisfied that I felt injured by the publication of the libel. I heard nothing on the subject from General Lyman. For myself I sought no explanation, and none on the other hand was given. Twelve days after I presented my case to the Grand Jury.”

Charles P. Curtis then testified for the prosecution, stating substantially the same facts as Mr. Webster had stated with regard to the action of Mr. Webster before the matter was presented to the Grand Jury, and said that it was the expectation of Mr. Webster

that some explanation would be made by General Lyman which should supersede the necessity of a public prosecution. At this point Chief Justice Parker observed that it was evident there was throughout the whole some "unfortunate misapprehension between the parties."

The Solicitor-General then read to the jury the affidavit which had been signed and sworn to by Mr. Lyman, November 17.

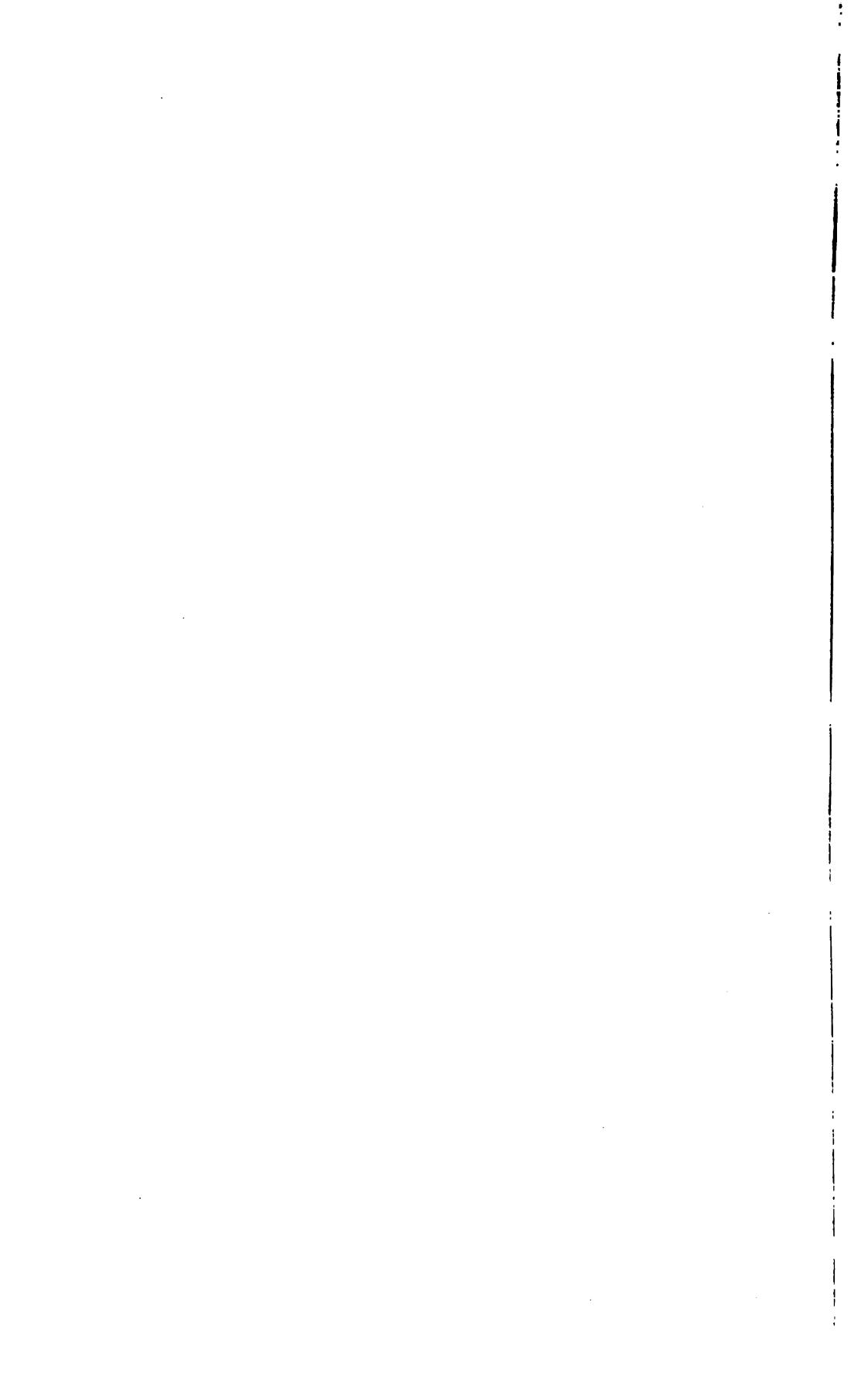
This closed the evidence in the case, and at three o'clock in the afternoon Mr. Hubbard began the closing argument for Mr. Lyman. It was upon the lines indicated by Mr. Dexter in the opening. He said to a common-sense view the question was whether the circumstances of the case showed beyond a reasonable doubt that General Lyman *intended* to libel Mr. Webster, and that the jury were to judge of the motives of Lyman, which if they were innocent and without malice did not make him, in the words of the indictment, an "infamous libeller."

He said: "It is a well-known fact that the object "for which the Jackson Republican was established "was to oppose the reëlection of Mr. Adams as President. Mr. Lyman at the close of a hot political contest publishes a certain letter of Mr. Adams bearing "strongly upon the motives and conduct of certain "leaders of the Federal party to show that he was



SAMUEL HUBBARD

From a Painting in the possession of Walter Buck, Andover, Massachusetts



“unworthy of their support. There was in this no
“malice against Mr. Webster on the part of Mr. Ly-
“man, but merely an attempt to hold up Mr. Adams
“to public ridicule. He had a right to do this. The
“Federal party was once a dominant one in the
“United States. It was an honour to any man to
“have belonged to it. Washington was at its head.
“For myself I feel it no disgrace to have been in its
“ranks. John Quincy Adams was at one time one of
“its leaders, associated with those very men whom
“he has publicly denounced. He afterwards disowned
“them and apostatized from them, and has also pub-
“licly called them traitors to their Country in oppos-
“ing the Embargo Law and the War. Mr. Lyman
“in his commentary only said that Mr. Adams on
“account of this strange charge was unworthy of the
“support of these persons, that they of all others
“had the least reason to support him. This was per-
“fectly justifiable for a political writer to say in order
“to promote the election of his own candidate, Gen-
“eral Jackson. When a person is to be chosen to the
“high office of Chief Magistrate of the United States,
“it must be expected that a full canvass of the merits
“of each candidate will be made, and a commentary
“on such merits or demerits is not to be inferred as
“malicious, either towards the candidates themselves,
“or their supporters.”

In order to show that Mr. Webster was one of the leading Federalists of New England at the period referred to by Mr. Adams, Mr. Hubbard said that he would refer to a pamphlet acknowledged by Mr. Webster to have been written by him on the Embargo Laws. The Solicitor-General objected to the reading of the pamphlet, or reference to a part of it, unless the whole was read. Mr. Hubbard said the pamphlet was in the case. He had a right to refer to it, but he did not wish to read the whole of it on account of the waste of time. The Solicitor-General still objected to reference to parts of the pamphlet, and the Chief Justice requested Mr. Dexter to read the whole pamphlet, which he did.

The pamphlet was entitled, "Are the Embargo Laws Constitutional?" It discussed at length the power of Congress to pass an embargo act, claiming that it had no constitutional power to create an embargo unlimited in time. It stated the disastrous effects of the embargo upon the United States, and showed how little injury it did to either England or France or their colonies. In this pamphlet Mr. Webster charged that the Embargo Acts originated in Jefferson's wish to favor France against Great Britain, saying, "The administration party are perpetually " singing the praises of the French Emperor. They " rejoice in his successes, and justify and applaud his

“most enormous acts of injustice and oppression . . .
 “and burst forth in exclamations of rapturous and
 “unhallowed joy at the progress of successful guilt
 “and violence. They even blasphemed Heaven, and
 “mocked it with diabolical gratitude, when they
 “thanked God that the world was blessed with this
 “detestable tyrant.”

In one part of the pamphlet Mr. Webster, referring to a statement made in Congress that trade with Canada was prohibited in order that “the sufferings of our citizens might be equal,” said, “This is as if your physician should draw one of your teeth, because it ached, and should then propose to draw another, from the other side of your face, which did not ache, in order to make the ‘suffering equal.’”

There was much laughter in Court at the reading of some passages of the pamphlet, and the simile of drawing a tooth which did not ache because one which did ache had been drawn from the opposite jaw received particular applause.*

After the reading of this pamphlet Mr. Hubbard continued his argument; saying that he wished he could entertain the jury as well by his argument as they had been entertained by the pamphlet they had just heard read; that the pamphlet itself showed that the author was a distinguished writer and leader

* Report in Advertiser, December 22, 1828.

among the Federalists of New England. He said: "It is claimed by Mr. Adams that the people were "openly instigated to violate the law of the Embargo. How violate a law if it was unconstitutional? "And jury after jury has decided that it was so. No "unconstitutional law can be violated, for such a "law is itself a violation of the Constitution. "It is apparent from the pamphlet, known to have "been written by Mr. Webster, that he was within "the legitimate meaning of the statement of Mr. "Adams,—he was one of the leaders of the New "England Federal party in 1808,—and if talents, "personal influence and an opposition to the restrictive system of that period constitute a leader, Mr. "Webster was not only a leader, but a powerful one. "He was of the same class as Messrs. Otis, Parsons, "Cabot, Dexter, Ames and others; he was engaged "in the same cause and had the same principles. If "the names of the Federal leaders of that period were "to be called who would think of omitting the name "of Webster? There can be no question that Mr. "Adams did mean Mr. Webster as much as any of "the others I have named."

Mr. Hubbard then discussed at some length the language of Mr. Adams, saying that the words "subsequent events" used by him doubtless referred to the Hartford Convention, and saying, "I do not stand

“here to vindicate the Hartford Convention. The
“members of that body, or most of them, are now
“living and can vindicate themselves and their mo-
“tives, if they need vindication. Neither do I wish
“to attack Mr. Adams. Each individual has a right
“to his opinions, and when he comes before the pub-
“lic with them, each individual has equally a right
“to comment on them. It was the whole Federal
“party, of which Mr. Webster was a part, which Mr.
“Adams aspersed, and General Lyman had a right
“to make the application. If in doing it he used the
“name of Daniel Webster when Mr. Adams meant
“to confine his charges of treasonable plots to Fed-
“eralists in Massachusetts alone, then Lyman’s men-
“tion of Daniel Webster was a mistake, but not a
“malicious and *infamous* libel. It is especially cor-
“rect that these accusations of Mr. Adams should
“be noticed *here*—the very spot at which some of
“the principal actors live, and where an effect was
“to be produced. Mr. Adams has made broad asser-
“tions and must have calculated that their conse-
“quences would be followed out by others. In pur-
“suing these consequences Mr. Webster’s name has
“been used, but all Mr. Lyman’s remarks meant was
“that Mr. Adams had disregarded the rights and
“opinions of a certain portion of the public in order
“to further his own interests, on which account he

“ was unfit for reëlection, or that if he believed his
“ own statements, then in consequence of having re-
“ ceived traitors, as he called them, to his councils,
“ he was unworthy of support.

“ My client is well known, and it is equally known
“ that previous to the election of Mr. Adams to the
“ office of President he was opposed to his election
“ and in favour of Mr. Crawford, and after the elec-
“ tion of Mr. Adams, and when the Federalists sup-
“ ported Adams, he seceded from their party and be-
“ came the advocate of the cause of General Jack-
“ son. The Federalists generally were in favor of Mr.
“ Adams. General Lyman saw fit to advocate the
“ cause of Jackson. Whether he was wise or not re-
“ mains to be proved. It is of no consequence in this
“ trial. But the gentlemen named in the supposed
“ libel were formerly Mr. Lyman’s political friends;
“ they were at the time when the alleged libel was
“ published his personal friends, belonged to the same
“ club, met week after week together. Is it possible
“ to conceive that he intended to libel his former po-
“ litical and present personal friends? The idea is a
“ monstrous one. The article bears a compliment on
“ its very face. No one with a fair mind can doubt
“ General Lyman’s intention in classing Mr. Webster
“ with those eminent gentlemen with whom he was
“ thus associated. All these other gentlemen are

“equally libelled if Mr. Webster was libelled. If it
“was a libel upon Mr. Webster it was also a libel
“upon Otis, Dexter, Prescott, Russell, Mills and all
“the others who were included,—but who among
“them was thus libelled by the publication? Do they
“deny the fact that they were opposed to the Em-
“bargo, that they were influential men, or do they
“avow it and justify their motives? In political con-
“tests the parties must frequently resort to the publi-
“cation of names. It is a thing to be expected by those
“who take part in the contests of the day. It is every-
“day practice. If General Lyman had not a malicious
“intent to libel *all* these gentlemen, then he did not
“intend to libel Mr. Webster, for they are *all* equally
“included in the article. I have as high an opinion
“of the character of Mr. Webster as has the Solicitor,
“but it is not for me at this time to sound Mr. Web-
“ster’s praise. I shall leave that to the Solicitor, who
“has said that this was emphatically the prosecution
“of the Commonwealth, whose duty it is to protect
“the character of its citizens.”

Turning to the Solicitor-General, he said: “I will
“ask of him,—Where was the kind care of Govern-
“ment when her best citizens, her mighty living and
“mighty dead, were traduced and vilified by Mr.
“Adams? When such men as Otis, Ames, Dexter
“and a long list of living and departed patriots were

“ branded with the name of traitors? Did the Soli-
 “ citor think General Lyman intended the paragraph
 “ on which this prosecution is founded as a malicious
 “ libel on these men when he first read it? If it is so
 “ apparently a malicious and infamous libel, how can
 “ my friend, Mr. Dexter, associated with me in this
 “ defence, sit here to protect Mr. Lyman, who has
 “ thus infamously libelled his deceased, lamented and
 “ respected father and his honoured father-in-law?*
 “ No one in his senses can say that it would be pos-
 “ sible for him to do it. Does Mr. Otis, or any other
 “ of these gentlemen, complain of this charge of Mr.
 “ Adams, or feel aggrieved at the comments of Gen-
 “ eral Lyman? Certainly not.

“ Mr. Lyman only called the attention of the reader
 “ to those persons who were intended by Mr. Adams
 “ in his absurd and ridiculous charge. If Mr. Adams
 “ said that the leading Federalists of New England
 “ were traitors, has not any member of the commu-
 “ nity a right to say who *were* leaders or traitors?
 “ When the most eminent men and greatest char-
 “ acters are thus traduced, have not the community
 “ a right to know the fact, and also to be informed
 “ who these men are? Has not an individual a right
 “ to ask of the community, whether the public will

* Franklin Dexter was the son of Samuel Dexter, and married a daughter of William Prescott.

“ support this traducer for the first office in the gift
“ of the people?

“ Mr. Adams meant *somebody*. It has been said that
“ corporations have no souls. Perhaps the Federal
“ party as such, or as a body, are in the same pre-
“ dicament. Yet its leaders have souls, among whom
“ is to be included Mr. Webster. If he was no
“ leader at the period spoken of, then General Ly-
“ man was guilty of a mistake, not of malice, in in-
“ cluding him with the others mentioned. But any
“ man who could write, and did write, such a pam-
“ phlet as that in this case must have been a leader.
“ The fact of the pamphlet itself, its intrinsic energy
“ and merit, show him to have been a leader,—one
“ who under any and all circumstances would have
“ been a leader.

“ The pointing out of the individuals alluded to by
“ Mr. Adams was only descriptive of the meaning
“ of Mr. Adams, done without any malicious intent
“ towards Mr. Webster and the others.

“ The prosecution originated in a mistake,—an un-
“ doubted mistake. No explanation was made by
“ General Lyman, or called for by Mr. Webster, and
“ no opportunity was given to explain.*

* In 1882, Mr. Lyman's son transmitted to the Massachusetts Historical Society a letter in Mr. Lyman's handwriting, stating how he came to write the alleged libellous article, his relations with Mr. Webster, and his views of the trial, and also stating how the former relations between himself and

“ But even Mr. Adams’s charge was not that of treason. It is not treasonable to oppose an unconstitutional law. Mr. Adams in saying that the Federal leaders were traitors in opposing the Embargo Law did not say anything libellous or call anybody a traitor. An intention to commit treason is not a commission of treason, and is not punishable by law. Therefore it was not libellous to accuse one of such an intention. A confederation of the New England States to confer with each other on the subject of dissolving the Union was no treason. The several States are independent and not dependent. *Every State has a right to secede from the Union without committing treason.*

“ Here it is stated that certain gentlemen were traitors for threatening to dissolve the Union. The time will undoubtedly arrive when this subject of a dissolution of the Union will be openly discussed in all parts of the United States. . . .

“ It seems that the feelings of Mr. Webster were hurt, and there was a question of etiquette, as to who should make the first advance. One waited for an explanation to be asked, and the other for a reparation to be made. On the part of Mr. Webster, he was surprised that General Lyman should

Mr. Webster were afterwards restored. See Massachusetts Historical Society Proceedings, vol. xix, p. 393.

“have written the alleged libel, and expected an explanation, which not being offered, he became angry—even the greatest men are not always free from this passion. No explanation, however, could be expected from General Lyman under the threat of prosecution, much less after an indictment, for then no honorable man could consent to make the explanation required. Mr. Lyman could not then honorably seek out and explain. He preferred to meet the charge at the hands of a jury of his Country.”

When Mr. Hubbard closed his argument, the Court, which opened at nine o'clock in the morning, had been in session, with only an hour's intermission at noon, until seven o'clock in the evening, and the Solicitor-General said that owing to fatigue he should not be able to do justice to the Government by making his closing argument that evening. The counsel for Mr. Lyman, however, deprecated an adjournment and objected. But the Chief Justice said that though it was an unfortunate point to break off the cause, still the counsel for the defence could recapitulate the chief points in their case the next morning if they desired, and he adjourned the Court until nine o'clock the next morning.

The defence then desired to make no further argument, and the Solicitor-General, wrapped in his

cloak in a heated atmosphere in a crowded court-room, argued the case of the Government for nearly three hours.

He said the case was a perfectly plain one; that the accusation against Mr. Webster was of the commission of one of the highest crimes known to the law, and that the answer was no more nor less than the admission of the fact of such accusation. He said he had a high respect for both parties in both their public and private situations, but the article was libellous and was malicious. As to the suggestion that the word "infamous" should not have been used in the indictment, he said that was the language of the law, and the indictment was framed from one in a case where Lord Mansfield was libelled; that if in describing this libel he could have legally called it by a softer name he would have said that "the " observations of Mr. Lyman relative to Mr. Webster " were unfair, unfriendly, unhappy, un-Christian, and " he might have also said ungentlemanly, but the " law designated the terms to be used."

Continuing, he said that the remarks of Mr. Adams in no sense applied to Mr. Webster, that they could have had no reference to him, and that there was as much difference between charging the leading Federalists of Massachusetts in 1808 with treason, and charging Daniel Webster with treason, as there was

between black and white. Mr. Adams, in speaking of the opposition to the embargo measures, spoke of the leading Federalists of the State in which he lived, in which jury after jury had said that the embargo was unconstitutional.

Proceeding, he said: "It is also asserted in the cal-
" umny of Mr. Adams that the Judiciary of Massa-
" chusetts were in league with the opposition to the
" Embargo, and in this treasonable plot. The whole
" related to the Legislature, the Judiciary, and to
" the leading Federalists of Massachusetts, and not
" to that of any other State.

" As to the suggestion of the defendant's counsel
" that the statement of Mr. Adams contained nothing
" very important, it was a charge that the Legisla-
" ture and the Judiciary and the leading Federalists
" of Massachusetts were preparing to produce a civil
" war, and yet it is said that a charge of this nature
" possesses but little of atrocity. But I say that when
" such charges are made it exhibits every abandon-
" ment of principle—of unutterable depravity. It is
" an infamous falsehood. The highest and most ven-
" erated characters are traduced. The most high-
" minded of this or any other Country are vilified.
" The counsellors and bosom friends of the immor-
" tal Washington are foully calumniated; those whom
" he trusted and loved are thus disgraced. They are

“ charged with the greatest act of human depravity
 “ of which any man can be accused, and this charge
 “ is made, not only against the living, but against
 “ those who have gone to their long account, against
 “ the good and the patriotic and the pious,—against
 “ such men as Ames, Cabot and Dexter.

“ The character of the State is implicated in the at-
 “ tack thus made, and if any men ever existed whose
 “ characters are above reproach they are those accused
 “ by Mr. Adams, and afterwards by General Ly-
 “ man, in the libel complained of. General Lyman in
 “ his communication most explicitly states that Mr.
 “ Webster was *recorded on the archives of the Gov-*
 “ *ernment as a traitor*, and no construction which has
 “ been given by the defendant’s counsel has changed
 “ that allegation, or its nature. . . .

“ As to the suggestion of the defendants that Mr.
 “ Lyman’s article was ‘scratched in a hurry,’ it can-
 “ not be the law of the land that such an excuse can
 “ justify him,—that he can ‘scatter firebrands, arrows,
 “ and death,’ and then say, ‘Am I not in sport?’ Such
 “ a defence argues a most criminal inattention to
 “ consequences, which is of itself a strong evidence
 “ of malice. It seems to be not only legal, but moral
 “ turpitude.

“ The charge of Mr. Adams was left without appli-
 “ cation. It was a blow in the dark, and General Ly-

“ man was the avowed author by giving a name and circulation to the poison. Instead of pronouncing “ the assertions of Mr. Adams to be false and calumnious, he adds to their venom and effect. In “ the face of the whole Country and all Europe— “ for Mr. Webster is as well known there as he is “ here, the defendant has stigmatized him as a *traitor*, and asserted that he has been so stigmatized “ by the President of the United States. How can “ Mr. Webster take his seat in the Senate under this “ imputation? May they not say to him: ‘With what “ face can you come here? How dare you show yourself among gentlemen?’

“ But if only one-millionth part of the injury which “ has been done and suffered had been caused by this “ article, what was the proper course? To make a “ frank and fair avowal of the mistake, if it was one, “ and a confession of the injury. This was the course “ which a just man and a gentleman should pursue “ in a moral and religious community. If this offence “ had been given in a different section of the country, it would not have been an hour before one or “ the other would have been a dead man. If in this “ libel the name of McDuffie* had been inserted instead of Webster, the gallant gentleman would

* George McDuffie was then a member of Congress from South Carolina, and a noted duellist.

“soon have had occasion to exclaim like Macbeth,

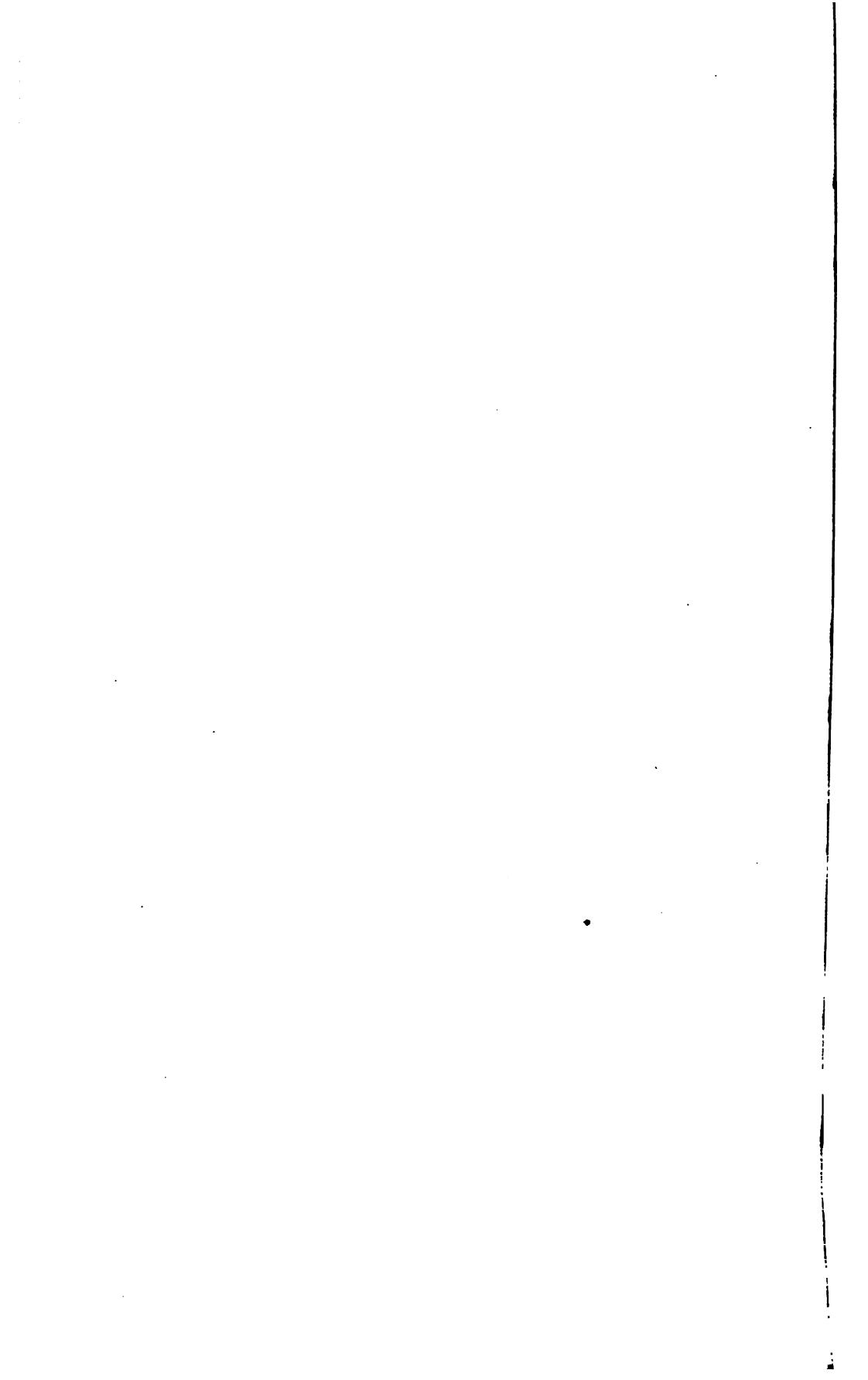
“*Lay on, Macduff,*
And damn'd be him that first cries, ‘Hold, enough!’”

“It cannot be required of him who is libelled to go
“cap in hand to the libeller, to ask for explanation.
“The defendant had time enough to make an ac-
“knowledgment, and he knew that it was expected.
“Mr. Webster waited twelve days, in which time
“no offer of reparation had been made, from which
“it was to be inferred that no explanation was ever
“intended on the part of Mr. Lyman. The affidavit
“of Mr. Lyman made it manifest that he never in-
“tended to make satisfaction except upon a verdict
“of the jury and judgment of the Court. I offered
“to enter a *nol. pros.* if Mr. Lyman would make a
“frank acknowledgment, which he declined to do,
“and this is inconsistent with his declarations of in-
“nocent intentions with relation to Mr. Webster.”

This closed the argument and the Chief Justice then charged the jury. He began by saying, “It is
“unfortunate there ever was occasion for this prose-
“cution, unfortunate that there has not been some
“amicable disposition of it upon explanations not
“derogatory to the honor of the accused, and yet
“satisfactory to the feelings of the party aggrieved.
“It is apparent but that for some point of etiquette,
“to which importance has been attached, such dis-



ISAAC PARKER
From a Painting in the Supreme Judicial Court, Boston



“position of the case would have taken place. But “the honor of the gentlemen is in their own hands, “and if that is thought to create an insuperable “barrier between them, we can only regret that the “controversy must be determined by the *ultima ratio* of peaceable citizens—a verdict of the jury “of their Country. In other parts of the country this “*ultima ratio* might have been of a different kind.”

Speaking of the parties, he said: “The accused and “the accuser stand before you, gentlemen, with high “claims upon your consideration and respect. The former has brought much reputation and dignity to this “his adopted State by his eminent talents in every “department where he has been called to act. His “name has pervaded every part of the Union, and “the fame of his talents has gone far beyond its limits. The latter is a native of your own city, has been “deservedly a favorite of the citizens, and has been “highly useful to the Commonwealth in civil and “military departments, and in support of those institutions which are the pride and ornament of the “city.”

The Chief Justice then discussed the question of the liberty of the press, saying, “No Country without “a free press and an educated people can long remain free; a free press ‘is the sustaining, vital principle of freedom—it proclaims the vices and abuses

“of the Government—the rights of the citizen—“the merits and demerits of rulers—and these are “its proper and legitimate offices. He who would “restrain it in the exercise of these functions commits treason against the fundamental principles of “civil liberty.””

“But,” he said, “the press is not invested with the “power of invading private character, or of circulating falsehood against public or private men. Powerful as the press is, it has a master. That master is “the *Law*, which when it transgresses its legitimate “bounds will punish the transgression. It is the law “—I believe it always was the law—that a jury in “a criminal case can determine both the law and the “fact.* With this popular guard over the rights of “the press and the rights of the citizen, the system “of a free press is safe from everything but occasional errors.” †

He then said to the jury: “The decision of this cause rests entirely with you,” and proceeded to state the leading principles of the law which should guide their deliberations.

He first discussed the alleged libellous article, say-

* The Supreme Court, in an opinion by Chief Justice Shaw, held otherwise in *Commonwealth vs. Anthes*, 5 Gray, 186, in 1855.

† And yet, in 1798, Isaac Parker voted and spoke in Congress against an amendment allowing jurors to be judges of the law in prosecutions under the Sedition Act.

ing, "The defendant had a right to publish a fair
"commentary upon a communication made by the
"President. If that high officer will commit his
"thoughts and opinions, or what he considers facts,
"to a public newspaper, they become public property,
"and any citizen has a lawful right to criticise or
"speculate upon the opinions, and to deny the facts
"or comment upon them, but he has not the right
"to misrepresent them, or to draw unreasonable in-
"ferences from them to the prejudice of the reputa-
"tion of other persons. If he does this wilfully, in such
"manner as to expose a third party to public indig-
"nation, hatred or contempt, he cannot shelter him-
"self under cover of the communication upon which
"he made his commentary. . . .

"I am of the opinion that if you should be satisfied
"that the gentlemen named in Mr. Lyman's article
"were the persons whom Mr. Adams intended to
"designate as the leaders of the Federal party at that
"time—that the insertion of those names would not
"be an unfair or unjustifiable commentary upon the
"communication—it would be only filling up a pic-
"ture, the figures of which were as distinct and dis-
"cernible to the mind, before as after filling up. And
"though this might be a libel by Mr. Adams, yet if
"the commentary introduced no new matter, and
"was only a fair exposition of the communication,

“it would not be a libel. If, however, the insertion
 “of Mr. Webster’s name was not justified by the
 “communication of Mr. Adams, and was done wil-
 “fully, and the effect is to expose Mr. Webster to
 “scorn or hatred, it is libellous. But if it was done
 “by mere inadvertence or mistake, it is not libel-
 “lous.”

As to the words of the article, saying that Mr. Adams had placed the names of the gentlemen mentioned upon a secret record in the archives of the Government as traitors to their Country, he said that “if this was a mere rhetorical flourish, if the jury are “satisfied that by ‘records’ and ‘archives’ is meant “nothing more than letters of Mr. Adams, the re- “mark is not libellous; but if they believe Mr. Ly- “man intended by this to assert that this charge of “Mr. Webster’s being a traitor was absolutely re- “corded, it is certainly the most serious part of the “subject.”

He then said, “If, from the political purpose with “which the Jackson Republican was set up,—that “is, of advocating the election of General Jackson, “and the defeat of Mr. Adams,—and from the tenor “of the article and the circumstances connected with “its publication, the jury believe that the names of “Mr. Webster and others were inserted only as illus- “trating the extreme injustice of Mr. Adams’s accu-

“ sation against the leaders of the Federal party, then
“ the article is not libellous.”

“ But,” he said, “ this is a matter about which you
“ will exercise your best discretion. You will not strain
“ the words to give them this meaning. You will form
“ your opinion cautiously and deliberately on the real
“ tendency and effect of the publication.

“ As to malice, if the publication was unjustifiable,
“ and its natural tendency was to create hostile feel-
“ ings, aversion and hatred to Mr. Webster, malice
“ is inferred by law. This inference, however, may be
“ rebutted by direct proof of an honest purpose and
“ an innocent design. Of this you are the judges.”

As to the indictment he said: “ With regard to the
“ form of the indictment, in which it is supposed there
“ is an unnecessary accumulation of harsh epithets,
“ I suppose it is in the usual form. The prefatory
“ words of general accusation are wholly immaterial.
“ If the defendant is convicted, it is only of this libel;
“ his character in other respects will stand as fair as
“ before. This is the antiquated dress of indictments,
“ which might usefully be exchanged for a more
“ modern costume.”

After the charge the jury retired, and the Court
waited some time for their return, and then adjourned
until three o’clock. The jury were then called in, and
were asked if they had agreed, to which the foreman

replied that they had not. The Chief Justice asked them if there was any question "concerning the nature of the law," or whether their disagreement was wholly upon the facts. The foreman answered: "*It is entirely upon the facts.* We do not disagree upon the law."

The Chief Justice then asked: "Is there any prospect of an agreement?" To which the foreman replied: "In my opinion there is none." The jury were then discharged.*

The case was continued until the March Term, 1829, and Mr. Lyman recognized in the sum of \$1000, without sureties, for his appearance at that time. In March, 1829, the case was again continued upon the same recognizance until the November Term of the same year, when the Solicitor-General entered a *nolle prosequi* in the following words, writ-

* The trial was concisely and fairly reported in the Boston Daily Advertiser, December 18, The New England Palladium and American Traveller, December 19, the Jackson Republican, and The Independent Chronicle and Boston Patriot, December 20, but none of the Boston papers made any editorial comment on the case. The Advertiser of December 22 gave the following as the action of the jury after they had retired for consultation.

"We publish the results of several ballottings of the traverse jury in the case. The following is authentic.

"1st ballot	<i>for conviction</i>	9
	<i>for acquittal</i>	3
"2nd ballot	<i>for conviction</i>	10
	<i>for acquittal</i>	2
"3d ballot	<i>for conviction</i>	10
	<i>for acquittal</i>	2"

This is the only information now to be had as to how the jury really stood and is probably not very reliable.

ten by him upon the back of the indictment now on file in Court.

“ NOVEMBER TERM, 1829.

“ This indictment was committed to a Jury, at the “ Nov^r Term of this Court 1828. This Jury, after “ a full and deliberate hearing of the evidence, ar- “ guments of Counsel, and a learned and impartial “ charge from the Chief Justice, were not able to “ agree upon a Verdict. From this fact and from the “ peculiar circumstances of this case, I am of opinion “ that public justice does not require that it shall be “ tried a second time. I will therefore no further prose- “ cute this Indictment; for which I also have the con- “ sent of the prosecutor.

“ DAN^l DAVIS SOL. GEN^l. ”

And thus this famous prosecution failed of its purpose and came to nothing. Mr. Webster had insisted that Mr. Lyman had charged him with a treasonable plot to break up the Union, and demanded a vindication from that charge by the verdict of a jury in the County where he and Mr. Lyman lived. He had prosecuted the case as a personal matter with all the resources at his command, and with the controlling influences of the community on his side, and yet he failed to obtain a verdict of vindication from the charge, obviously because the jury were not convinced that the charge was ever really made.

A careful examination of all the facts and circumstances of the case must convince any impartial mind that Mr. Lyman never intended to charge Daniel Webster with having been at any time engaged in any treasonable plot to break up the Union. What he intended was to charge John Quincy Adams as President with a libel upon the leading Federalists of Massachusetts, because Adams had said that they had engaged in 1808 in a plot to break up the Union. This charge against Mr. Adams necessarily implied that the leading Federalists were not engaged in the plot in which Mr. Adams said they were engaged. Lyman inadvertently, and perhaps erroneously, named Webster as one of the persons to whom the charge of Adams applied. He did not thereby in any fair sense make the charge of Adams his own, and it was only by an unfair and forced construction of his language that it could be claimed he had applied the charges of Adams to Webster and the others named in his article, or that he had himself charged that these eminent citizens had ever engaged in a plot to break up the Union.

Mr. Webster required no vindication from such a charge if it had been made by Mr. Lyman. The claim of the Solicitor-General that Webster could not return to Washington unless vindicated by the verdict of a jury was absurd, and his statement that Mr.

Webster's "children and friends were interested in wiping away the stain created on the escutcheon of his reputation by so foul a charge" was nonsense. It is difficult to believe that Mr. Webster himself thought it necessary for his personal or official vindication to institute this extraordinary prosecution. He was doubtless induced to do it only as a part of the bitter political contest then being waged between the friends of Adams and of Jackson. The subsequent conduct of Mr. Lyman towards Mr. Webster shows that he considered the case as really political and not personal on the part of Mr. Webster. Of course, the trial for the time interrupted the previous intimate social relations between Webster and Lyman, but in a year or two they became reconciled and remained warm personal friends through life. The reconciliation came about in this way: In December, 1829, Mr. Webster married as his second wife Miss Caroline Leroy of New York, a former schoolmate of Mrs. Lyman, who was a Miss Henderson of New York, and Mr. and Mrs. Lyman were informed that if Mrs. Lyman thought proper to call on Mrs. Webster on her arrival in Boston the visit would be received with pleasure and returned. This was done, and after that the families were on intimate social terms.

Mr. Lyman admired Mr. Webster, and took his

youngest daughter, who is now living in Boston, to hear him speak; and when she visited Washington, while Mr. Webster was in the Senate, she also became an admirer of Webster, and tells of his personal charm in society, of his impressive appearance, of how she used to go to the Senate only "to look at him," and of how the Senate always filled at once when word was passed that "Webster is up." When Mr. Webster's favorite daughter, Julia Appleton, died in 1848, and Mr. Webster was in great grief, Mr. Lyman went to see him, and they had a very affecting interview, recalling the old times when they were both young men.

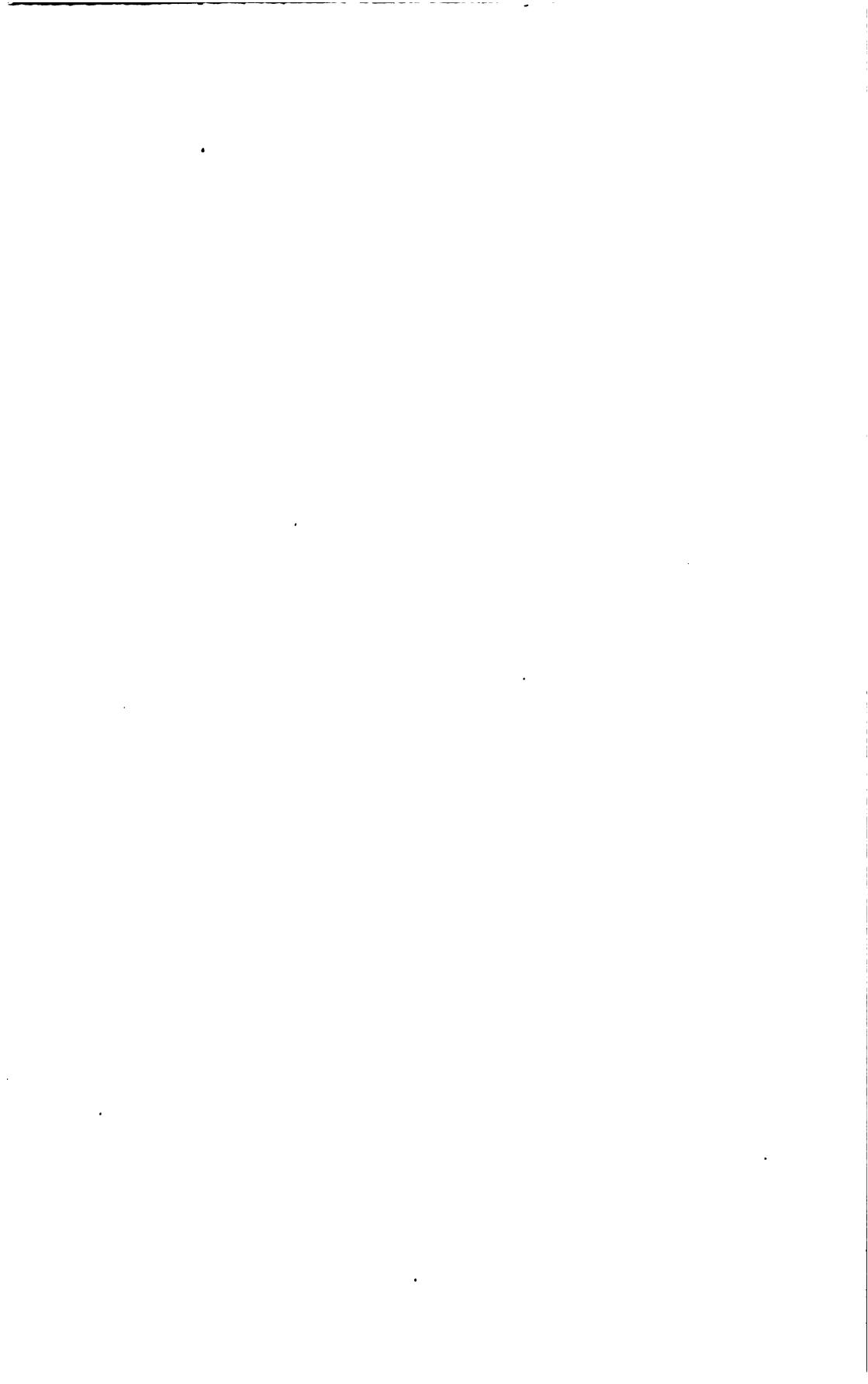
Closely connected with this trial was the famous controversy between John Quincy Adams and certain Massachusetts Federalists as to his charges in the *Intelligencer* of October 21, 1828. On November 26, 1828, after Mr. Lyman had been indicted and before his trial, "Harrison Gray Otis, Israel Thordike, William Prescott, T. H. Perkins, Daniel Sargent, John Lowell, William Sullivan, Charles Jackson, Warren Dutton, Benjamin Pickman, Henry Cabot (son of the late George Cabot), C. C. Parsons (son of the late Theophilus Parsons), and Franklin Dexter (son of the late Samuel Dexter)," wrote Mr. Adams and asked him to name the leading Federalists in Massachusetts, who, as he had charged, in-

tended to dissolve the Union in 1808, and to give the evidence on which the charge was founded. December 30, Mr. Adams wrote a long reply to this letter reiterating his charge, but refusing to give names or to state evidence in support of it. The signers then published as a supplement to the Boston Daily Advertiser of January 24, 1829, their letter, Mr. Adams's reply, and "An appeal to the Citizens of the United States," in which they solemnly denied all knowledge of any project to break up the Union, or of any plan analogous to it in 1808, or at any other time, and severely commented upon Mr. Adams's charges and conduct. They also printed these papers as a pamphlet, which passed through two editions and was circulated throughout the United States. Mr. Adams was much incensed, and prepared a long and bitter reply, in which he concentrated and stated all that could be said against the New England Federalists. This reply, entitled "Appeal to the Citizens of the United States," was not printed until November, 1877, when it was published in "Documents Relating to New England Federalism," by Henry Adams, pp. 68-829. A statement of its charges is given in the *Life and Letters of Cabot*, by Lodge, published earlier in 1877, p. 412 *et seq.* Numerous allusions to the preparation of it occur in Mr. Adams's diary in 1829.

This prosecution of Mr. Lyman was one of the last acts in the long reign of the Federal oligarchy who ruled Massachusetts for nearly half a century. They had wealth, social position and political power, and tolerated no opposition to their ascendancy, and punished all political insubordination with relentless severity. They were the "Federal Gentlemen" in Boston, the "Essex Junto" in Essex, and the "River Gods" in the Connecticut Valley. They were accomplished, able and patriotic men, who governed the Commonwealth wisely and well in its local affairs; but they yielded slowly and with extreme reluctance to the power of the National Government under the Federal Constitution. The Federal Union was to them good as long as it worked good to their local interests, and when it did not, they deemed it entirely patriotic to consider the question of its dissolution; hence the Northern Confederacy scheme of 1804, the violent and almost forcible opposition to the Embargo in 1809, and the determined opposition to the War of 1812, culminating in the nullification proceedings of the Hartford Convention in 1814.

But time and commerce did their work. The spirit of nationality slowly grew among the plain people, and finally the rule of the local States' rights statesmen came to an end. The first successful revolt was in Boston, when, in 1831, Harrison Gray Otis was

defeated for Mayor, and in 1888, within four years after the Federal oligarchy had placed Theodore Lyman in the dock as an indicted criminal, he was elected Mayor as the "Jackson Candidate."



APPENDIX

COMMONWEALTH OF MASSACHUSETTS

AN ACT to secure the People of this Commonwealth against Unreasonable, Arbitrary, and Unconstitutional Searches in their Dwelling-Houses

WHEREAS it is declared and provided in and by the fourteenth article of the Declaration of Rights of the inhabitants of the Commonwealth of Massachusetts, that "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers and possessions; and that all warrants are contrary to this right, if the cause or foundation of them is not previously supported by oath or affirmation:

And whereas it is also provided in and by the sixth article of the amendments to the Constitution of the United States, that "The rights of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons to be seized. And it being the duty of the Legislature to protect the Citizens of this State against the infringements of their essential rights, and to provide effectually for the punishment of those who violate them: Therefore,

Sec. 1. Be it Enacted by the Senate and House of Representatives in General Court Assembled, and by the authority of the same, That if any person or persons, after the passing of this

act, in contempt and violation of the said provisions in the Declaration of Rights and Constitution aforesaid, shall enter any dwelling-house of any Citizen of this Commonwealth, situate within the same, to search the same house for any specie or any articles of domestic growth, produce or manufacture, under pretence of any authority whatsoever, without or against the consent of the owner of such Dwelling-house, and not having a warrant therefor, supported by oath or affirmation, and issued by a Magistrate having competent authority to issue the same, every person so offending shall be adjudged to be guilty of a high misdemeanor, and shall, on conviction thereof in the Supreme Judicial Court, be sentenced by said Court to pay a fine to the use of the Commonwealth, not exceeding the sum of five hundred dollars, and to suffer imprisonment in the common Gaol of the County in which the conviction may be, for a term of time not exceeding six months, or either of said punishments, according to the circumstances and aggravation of said offence.

Sec. 2. Be it further Enacted, That if any person or persons, after the passing of this Act, in contempt and violation of the said provisions in the Declaration of Rights and Constitution, aforesaid, shall enter any Dwelling House of any Citizen of this Commonwealth, situate within the same, being armed with any offensive or deadly weapon, to search the same house for any specie, or any articles of domestic growth, produce or manufacture, under pretence of any authority whatsoever, without or against the consent of the owner of such Dwelling House, and not having a warrant therefor, supported by oath or affirmation, and issued by a Magistrate, having competent au-

thority to issue the same, every person so offending, shall be adjudged to be guilty of a high misdemeanor, and shall, on conviction thereof, in the Supreme Judicial Court, be sentenced by said Court, to pay a fine to the use of the Commonwealth, not exceeding the sum of One Thousand Dollars, and to suffer imprisonment in the common Gaol in the County in which the conviction may be, for a term of time not exceeding twelve months or either of said punishments, according to the circumstances and aggravation of said offence—Provided, however, that nothing in this act shall be construed to affect, or in any manner impair, the remedy which any person might have had for damages in a civil action if this Act had not been passed.

In the House of Representatives, Feb. 25, 1809, this bill having had three several readings passed to be enacted.

TIMOTHY BIGELOW, Speaker

This bill having had two several readings passed to be enacted.

H. G. OTIS, President

A comparison of this bill with the provisions of the Embargo Act of January 9, 1809, shows that it made the Acts authorized by the United States Statute crimes under the State Statute, and was in effect a State law nullifying the law of Congress.

Lieutenant-Governor Levi Lincoln, who had become acting Governor by the death of Governor Sullivan, vetoed this bill, and on its return by him to the Senate with his objections, the vote upon passing it, notwithstanding his objections, was nineteen to eighteen.



INDEX

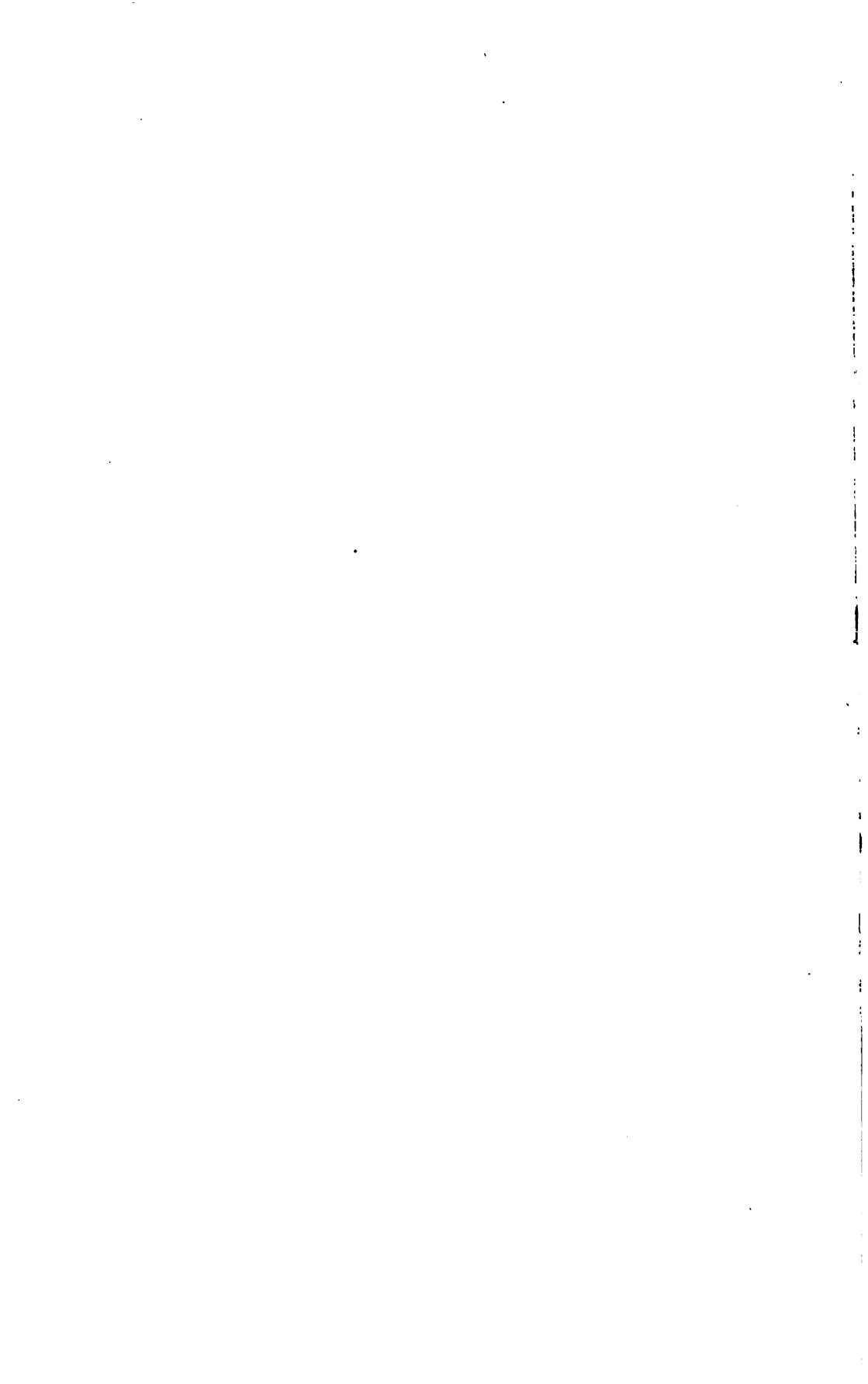
ACT against unconstitutional Searches of Dwellings, 20, 111, 112, 113
Adams, Henry, 107
Adams, John, 20
Adams, John Quincy, 3, 6, 7, 8, 9, 10, 11, 28, 69, 70, 71, 73, 74, 76, 80, 81, 84, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95, 99, 100, 104, 105, 106, 107
Advertiser, Boston Daily, 5, note on 6, note on 102, 106
Affidavit of Theodore Lyman, Jr., 47 *et seq.*, 68, 69, 80
Alien and Sedition Acts, 20
Ames, Fisher, 84, 87, 94
Arguments in trial
 Davis, Daniel, 64-66, 92-96
 Dexter, Franklin, 67-71
 Hubbard, Samuel, 80-91
Atheneum, Boston, 33
Austerlitz, 12
Austin, James Trecothic, 31, 51 and note, 75
BICKLOW, TIMOTHY, 113
Boston at time of trial, 30, 31, 32, 33
Boston City Hall, 62
Boston Common, 77 and note
Boston Court Houses, 62 and note
Boston Directory, 31, 63
Boston Farm School, 61
Burr, Aaron, 24
CABOT, GEORGE, 24 and note, 84, 94, 106, 107
Cabot, Henry, 106
Callender, Jonathan, 32, 45, 46
Centinel, Columbian, note on 6, 31
Charge to jury by Judge Parker, 96-101
Churches in Boston in 1828
 Church of the Holy Cross, 33
 First Church, 33
New South, 33
Trinity, 33
Clay, Henry, Letter to Webster from, 4
Constitution, Federal, 2, 25
Court Houses in Boston, 62 and note
Crawford, William H., 86
Curtis, Charles Pelham, 29 and note, 32, 67, 74, 76, 79
Curtis, George Ticknor, 3, 4
DAVIS, DANIEL (*Solicitor-General*), 1, 31, 35 and note, 45, 52, 63, 64, 66, 67, 71, 73, 78, 80, 82, 87, 91, 102, 103, 104
Davis, John, 32 and note
Dawes, Francis O., 67
Decrees
 Berlin, 5, 12, 27
 Milan, 5, 13, 27
Dexter, Franklin, 32, 46, 63, 67 and note, 68, 71, 76, 88 and note, 106
Dexter, Samuel, 7 and note, 8 and note, 10, note on 32, 63, 84, 87, 88 and note, 94, 106
Dutton, Warren, 32, 77 and note, 106
Dwight, Theodore, 24
ELIOT, CHARLES W., note on 60
Eliot, Samuel A., note on 60
Embargo Acts, 2, 5, 6, 9, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 71, 72, 73, 81, 82, 87, 90, 93, 108, 113
 Petitions for relief from, 19, 20
“Era of good feeling,” note on 75
Everett, Edward, 3
FANEUIL HALL, 8
“Federal Gentlemen,” 108
Fletcher, Richard, 30 and note, 32, 52, 74, 79

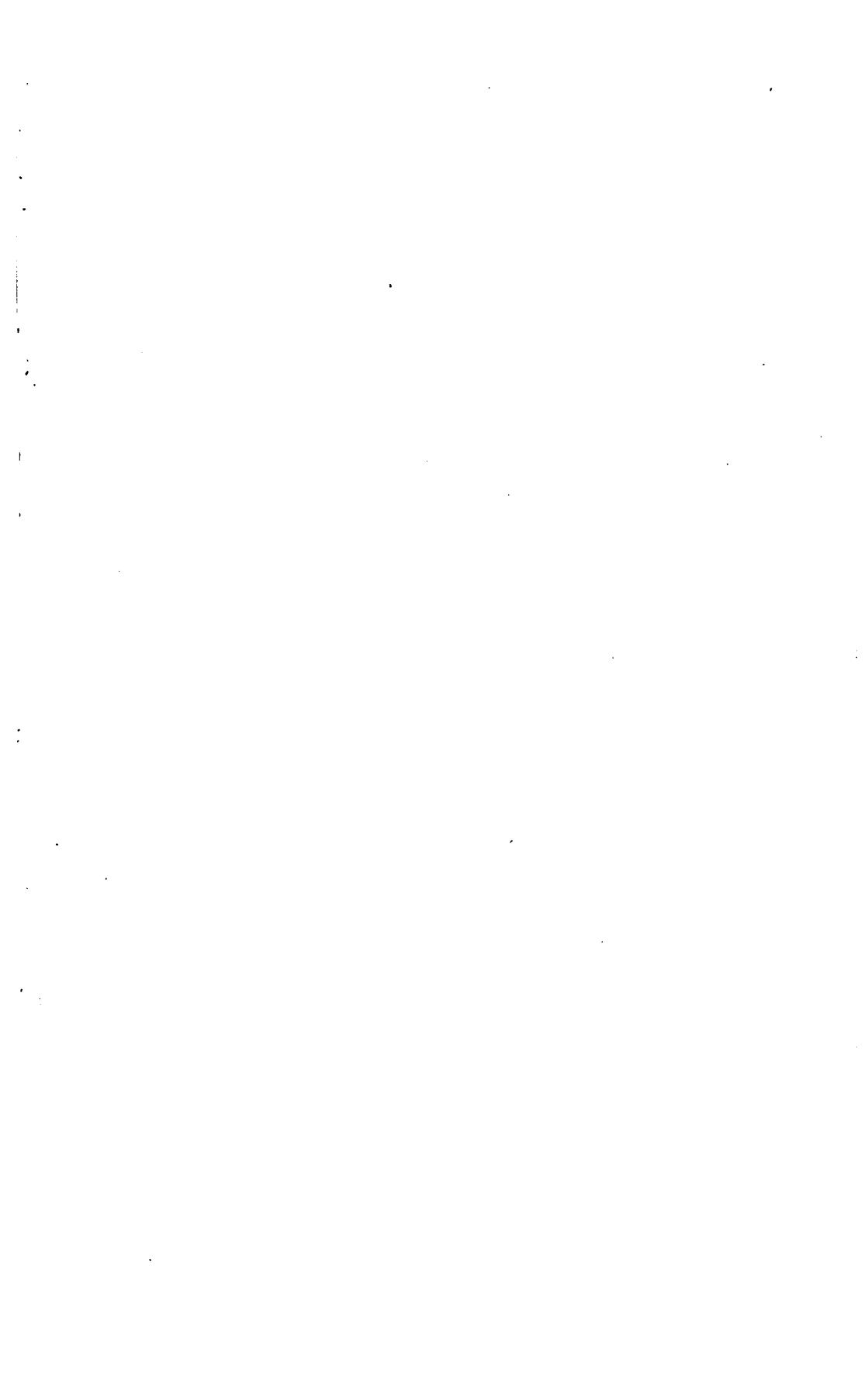
<p>Force Act, 18, 19, 20, 22 France, 18, 23 GALLATIN, ALBERT, 14 Gaol, note on 62 George III, 5 "Gerrymander," note on 75 Giles, William B., 6, 8 Griswold, Roger, 24 HARTFORD CONVENTION, 2, 4, note on 10, 24, 25, 26, 28, 84, 108 Harvey, Peter, 3 Hubbard, Samuel, 31, 46, 63 and note, 73, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91 INDICTMENT against Theodore Lyman, Jr., 36 <i>et seq.</i> Judge's comment on, 101 "Infamous Libel," 48, 69, 85, 88, 93 Intelligencer, National, Washington, 6, 7, 9, 58 Interrogatories put to Lyman, 66 JACKSON, ANDREW, 6, 33, 62 and note, 86, 105, 109 Jackson, Charles, 106 Jackson Republican, 6 and note, 9, 29, 58, 65, 67, 74, 75, 76, 78, 79, 80, 100, note on 102 Jefferson, Thomas, 5, 6, 7, 8, 9, 14, 15, 16, 18, 19, 32, 23, 26, 82 Johnson Hall, 62 Jurisdiction of Supreme Judicial Court in Libel Case, 34, 76, 79 Jury in Libel Trial, 63 LANMAN, CHARLES, 3 Leroy, Caroline, 105 Liberty of the press, 65, 66, 97, 98 Lincoln, Levi, 113 Lodge, Henry Cabot, 3, note on 35, 107 Lowell, John, 39 and note, note on 77, 106 Lyman, Isaac, note on 60 Lyman School, 61 and note Lyman, Theodore, Jr., biography, 60 Lyman, Theodore, note on 60</p>	<p>MADISON, JAMES, 23, 26 Mall. <i>See</i> Boston Common Mansfield, Lord, 92 Merchants' Hall, 75 and note Mercury, Massachusetts, note on 6 McDuffie, George, 95 and note Mills, Elijah H., 7, 10, 87 Minot, William, note on 35 NANTUCKET, 16 Napoleon, 5, 12, 13, 82 Nelson, Lord, 12 <i>Nolle prosequi</i>, 102 OBJECTIONS to affidavit of Lyman, 52 <i>et seq.</i> Opening argument, 64 Orders in Council, 5, 12, 13, 14, 23 Orne, Henry, 31, 74 and note, 76 Otis, Harrison Gray, 3 and note, 7, 9, 31, note on 62, 77, 78, 84, 87, 106, 108, 113 PARKER, ISAAC, 3 and note, 32, 52, 57, 63, 72, 73, 80, 91, 96, 97, 98 and note, 99, 100, 101, 102 Parsons, C. C., 106 Parsons, Theophilus, 84, 106 Perkins, T. H., 106 Pickering, Timothy, 22 and note, 23, 26, 28, 60, note on 61 Pickman, Benjamin, 106 Plumer, William, 24 Poor debtors, 17 Pray, Isaac, 31, 45 Prescott, William, 7, 10 and note, 78, 106 Prison Lane, note on 62 Putnam, John, 67 QUINCY, JOSIAH, 7, 8 and note, 10, 31 Quincy, Josiah, Jr., 31 REPORT of trial in newspapers, note on 102 "River Gods," 108 Rockingham Memorial, 27, 72, 73 Russell, Benjamin, 7, 10, 31, 74 and note, 75, 87 SARGENT, DANIEL, 106</p>
---	---

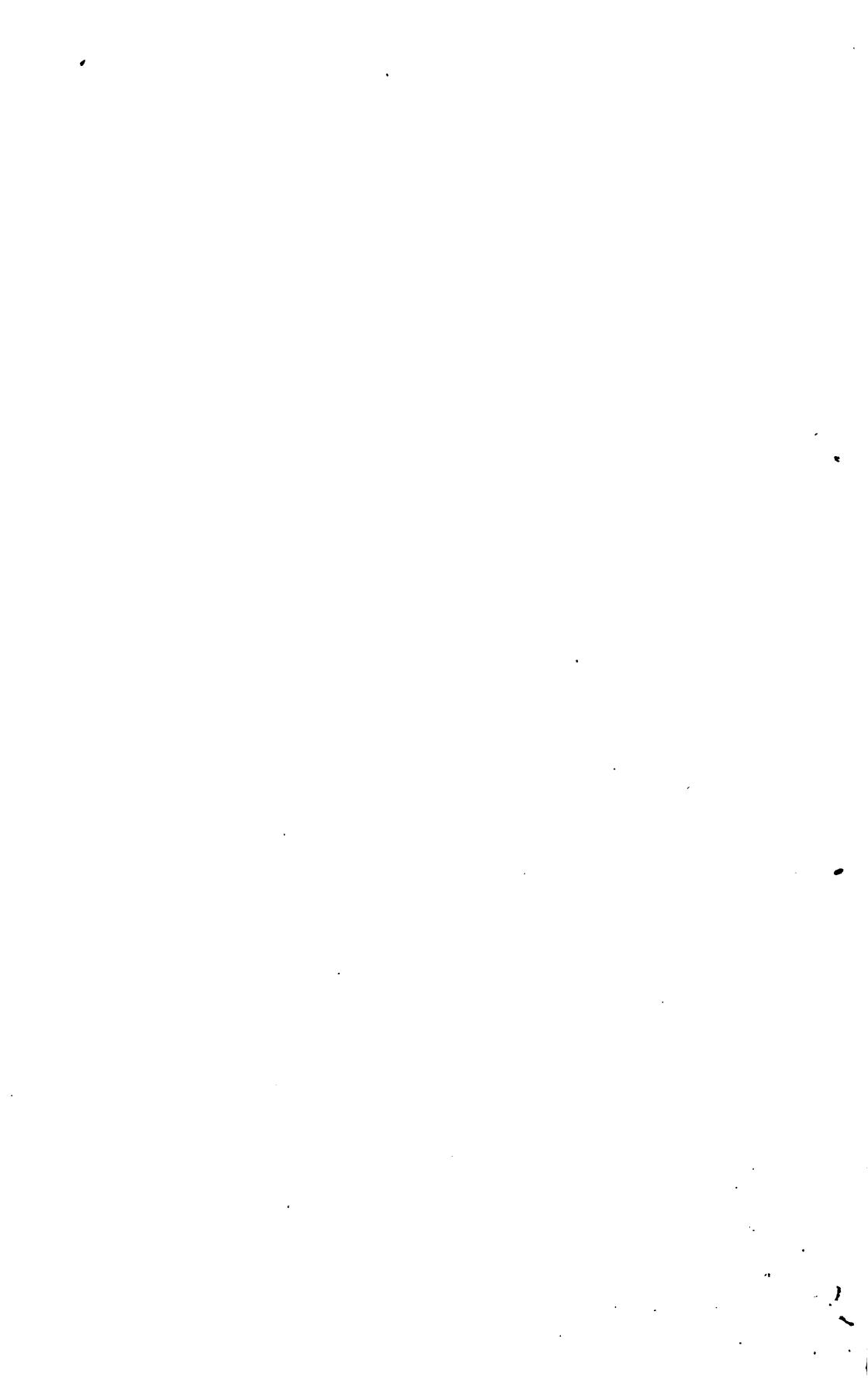
<p><i>Scandalum magnatum</i>, 35</p> <p>Sentinel. <i>See</i> Centinel</p> <p>Shaw, G. Howland, note on 38</p> <p>Shaw, Mrs. G. H. (Miss Lyman), 106</p> <p>Ships, American, 12</p> <p>States' Rights, 2, 20, 21, 22, 24, 27, 28, 29, 73, 90</p> <p>Story, Joseph, 92 and note</p> <p>Sullivan, William, 106</p> <p>Tariff, 13 and note</p> <p>Thacher, Peter Oxenbridge, 34 and note</p> <p>Testimony at trial</p> <p> Austin, James T., 75, 76</p> <p> Curtis, Charles P., 79</p> <p> Dawes, Francis O., 67</p> <p> Dutton, Warren, 77</p> <p> Orne, Henry, 74, 76</p>	<p>Putnam, John, 67</p> <p>Russell, Benjamin, 74, 75</p> <p>Webster, Daniel, 72, 78</p> <p>Williams, Henry, 75</p> <p>Thorndike, Israel, 7, 10, 32, 33, 38 and note, 77, 106</p> <p>Trafalgar, 12</p> <p>Trumbull, Jonathan, 21</p> <p>VIRGINIA, note on 25</p> <p>WAR OF 1812, 23, 27, 29, 108</p> <p>Washington, George, 81, 93</p> <p>Webster, Caroline, 105</p> <p>Webster, Daniel, biography, 59, 60</p> <p>Webster, Julia Appleton, 106</p> <p>Welles, John, 7, 10 and note, 32</p> <p>Whitman, John W., 5</p> <p>Williams, Henry, 75</p>
--	---



A Limited Edition of four hundred copies of this volume was printed
by D. B. UPDIKE, THE MERRYMOUNT PRESS, BOSTON, in June,
1904. This is copy No. 166







AP ABH QAn
A notable libel case
Stanford Law Library



3 6105 044 060 809